REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA.

BY

FREDERICK WATTS,
COUNSELLOR AT LAW.

VOL. I.

MAY 1832 TO JUNE 1833.

PHILADELPHIA:
JAMES KAY, JUN. & BROTHER, 122 CHESTNUT STREET.
PITTSBURGH: JOHN I. KAY & CO.
MDCCCXXXIV.

Philadelphia:
Printed by James Kay, Jun. & Co.
Race Street above 4th.

SUPREME COURT OF PENNSYLVANIA.

Hon. JOHN GIBSON, Chief Justice.
Hon. MOLTON C. ROGERS, Justice.
Hon. CHARLES HUSTON, Justice.
Hon. JOHN KENNEDY, Justice.
Hon. JOHN ROSS, Justice.
Hon. THOMAS SERGEANT,(*a*) Justice.

ELLIS LEWIS, Attorney-General.
GEORGE M. DALLAS,(*b*) Attorney-General.

(*a*) Appointed in the room of Hon. John Ross, deceased.
(*b*) In the room of Ellis Lewis, resigned.

TABLE OF CASES.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

LANCASTER DISTRICT, MAY TERM 1832.

Kerper *against* Hoch.

The fourth section of the act of 4th April 1797, which provides that no debts of a decedent, unless they be secured by mortgage, judgment, recognizance or other record, shall remain a lien on lands and tenements longer than seven years after the decease of such debtor, unless suit be brought within seven years, or a statement of the debt be filed in the prothonotary's office, is a statute of limitation and repose, and protects not only *bona fide purchasers*, but *heirs* and *devisees* and those claiming under them.

Where nearly *nine* years after the death of intestate, suit was brought and judgment had against his estate, it was held that the person so obtaining judgment could not come in upon any portion of the parcels of land taken by the intestate's son under a writ of partition and valuation of the real estate of his father, and sold by virtue of judgments against the son, neither as against the creditor of the son, nor the son himself.

ERROR to the court of common pleas of *Berks* county.

In this case, *Jacob Gosler*, whose father died intestate, had taken certain parts of the real estate of the intestate, Nos. 1, 4 and 6, according to a partition and valuation which had been made of it, under a writ issued for that purpose out of the orphan's court of Berks county; and had entered into recognizance, to pay to the widow of the deceased the interest annually upon one third of the valuation money during her life, and to pay to the other children, four in number, their respective portions of two thirds of the valuation, in one year, with interest; and their proportion of the re-

maining third upon the death of the widow. He also, at the same time, gave his bonds to them for the payment of the first two thirds, which were to be paid with interest in one year. The father died on the 24th of January 1816. The lands taken by *Jacob* were decreed to him by the orphan's court on the 7th day of January 1817; and on the 10th of the same month, he entered into the recognizance and gave his bonds.

A suit was brought against *Jacob*, upon his recognizance, in the court of common pleas of Berks county, to August term 1822; and on the 12th of August 1822, judgment was obtained against him, in favour of the other children and heirs of his father, for the balance unpaid to them of their respective portions of the first two thirds of the valuation money. On the 25th of March 1823, *Jacob* had paid off all the bonds given, with the exception of the one which he had given to his brother *John;* upon which there remained a balance due of about 650 dollars, which *John* on that day, for a valuable consideration, assigned to *Joseph Hoch*, the defendant in error.

At November term 1820 of the court of common pleas of Berks county, *Jacob Gossler* confessed a judgment to *John V. Epler*, for a penalty of 2000 dollars, to secure a debt which he owed to him; and on the 11th of November 1822, in the same court, *Peter Rodermel*, another creditor of *Jacob Gossler*, obtained a judgment against him for 546 dollars and 10 cents, upon which an alias *fieri facias* was issued to April term 1824, and the parts Nos. 1 and 6 of the estate, late of the father of *Jacob Gossler*, which had been decreed to *Jacob* by the orphan's court, were levied on as the estate of *Jacob*, and condemned; and under a writ of *venditioni exponas*, issued to August term 1824, both parts were sold to *Elizabeth Gossler*, the widow; No. 1 at 681 dollars, and No. 6 at 6 dollars, subject to her annuity. The money arising from these sales was paid by her to *Daniel Kerper*, the sheriff and plaintiff in error, who still holds it to pay *Conrad Shep*, a creditor of the deceased.

In the common pleas of Berks county, to November term 1824, a suit was brought against the administrators of the father of *Jacob Gossler*, upon a bond given by him to *Conrad Shep*, dated the 27th day of May 1813, in the sum of 200 pounds, conditioned for the payment of 100 pounds three years after its date, and on the 8th of November 1824, judgment was rendered in favour of *Conrad Shep*, for the amount of the bond.

Upon this statement of facts, contained in a case stated, and agreed to be considered in the nature of a special verdict, the court below rendered a judgment in favour of *Joseph Hoch*, who was the plaintiff there, against the plaintiff in error.

The following errors were assigned.

1. By acts of intestacy before the 4th of April 1797, the debts of testators and intestates were charges on their real estates indefinitely.

2. The change made by the act of the 4th of April 1797, was in favour of *bona fide* purchasers only, and does not embrace creditors.

3. *Jacob Gossler*, under whom the plaintiff in error claims for the use of *Conrad Shep*, took the land in question as heir, and not as purchaser, and as he held it under the charge and liable to the debts of his father, the plaintiff claims under said *Gossler* and stands in his shoes.

Hopkins, for the plaintiff in error.

Creditors have a lien on the real estate of a decedent, against his heirs or devisees. In *Graff* v. *Smith's Administrators*, 1 *Dall.* 482, a creditor took the real estate out of the hands of the alienee of the heir. *Jacob Gossler* is a volunteer, whose claim to the land is subject to the intestate's just debts. His recognizance was to pay *heirs*, in whose hands this land was liable for the debts, and this condition of the estate which existed at the time of the appraisement, continued afterwards when in *Jacob's* possession. For it cannot be, that mere volunteers, by hurrying through a partition and valuation of an intestate's estate, can affect injuriously the rights of the creditors of the estate: and *Jacob*, who took the land at the valuation, had no other nor higher character in respect to the shares of his brothers and sisters than they had, but as to these shares is a mere volunteer. Judgment, therefore, against *Jacob Gossler*, should not be paid out of the assets of his father's estate, but as subordinate to the claims against the estate. The act of 4th April 1797, relates to *bona fide* purchasers, and to them alone; persons claiming under heirs or devisees are not entitled to the benefit of it. The assignee of a chose in action stands in the place of the assignor. So *Hoch* stands in the situation of *John Gossler*, of whose state and condition he had full notice by the recognizance. Besides, the statute is meant to protect the *bona fide* purchasers of real estate, not the assignees of *choses in action*. There is no limitation as respects the *proceeds* of real estate: *real estate* alone is mentioned. It cannot be endured, that heirs should enjoy the estates of their ancestors clear of the incumbrance of their debts: their rights must be subject to those of creditors. The judgment creditors of *Jacob Gossler* must claim, subject to the creditors of his father's estate, because their liens are upon the interest of the son alone, and the act of assembly protects purchasers only, and not judgment creditors. If we find the fund in the hands of children, we should be entitled to be paid. So if claimed by a transfer of their right to the money. Independent of the act of 4th April 1797, the lien of a debt against the estate of a decedent, is indefinite in duration; and no change in regard to this case is made by it. In *Bruch* v. *Lantz*, 2 *Rawle* 392, it was held, that an executor who buys under a power to sell, at his own sale, was not protected by the act of 1797.

Baird, for the defendant in error.

An heir taking property at the appraisement, and paying the purparts of the other heirs, is a purchaser of such real estate. 6 *Serg. & Rawle* 257; 8 *Serg. & Rawle* 167, 181. Here *Jacob Gossler* bought five-sixths of the property, and for one-sixth only paid nothing.

The sheriff sold his estate, and not that of his father. If a sale had been made under an execution against the father's administrator, not more than one-sixth could have passed; and even as to that sixth, the debts of the intestate could not be thrown on it exclusively.

The act of assembly protects not only purchasers, but also judgment creditors of the heir who takes the property at the appraisement. The act is an act of limitation, and is general in its terms. Will it be contended, that from the words of the preamble, none but *bona fide* purchasers are protected? The words are similar to the preamble to the law, limiting the lien of judgment to five years, yet the supreme court decided that judgment creditors were within the purview of the act, as well as purchasers. *Bank of North America* v. *Fitzsimmons*, 3 *Binn.* 342; 11 *Serg. & Rawle* 94, 97. The case of *Bruch* v. *Lantz*, 2 *Rawle* 392, does not stand in the way of this construction. The point there decided was, that the sale by an executor to himself under a power in the will, did not constitute him a *bona fide* purchaser. But if it were against equity in *Jacob Gossler* to insist on the limitation, the conscience of *Joseph Hoch* is not affected, and he may insist on it. By becoming a purchaser of one of the heirs' shares, *Jacob Hoch* comes within the purview and protection of the act. Nothing but record liens bind property. 7 *Serg. & Rawle* 64, 80. An equitable lien does not come in. *Ibid.* The policy of the law is to enforce strictly these limitations. *Ibid.* 74. There is a statute in Massachusetts limiting suits against executors and administrators to four years from the death of testator or intestate. Courts say, that this statute is for the benefit of the estates, and those interested in them. A promise there by executor after four years, will not take the case out of the statute. 13 *Mass.* 201. Nor can the executor waive the bar. 16 *Mass.* 429. Even where he had suffered judgment to go by default, his sureties were allowed to plead the statute. 15 *Mass.* 6. So where executor himself paid the debts, he cannot after four years obtain an order of sale, unless estate remain *in statu quo* without partition. 15 *Mass.* 58. Reason of this strictness. *Ibid.* 143. It is the policy of the law, that estates of intestates should be settled. Heirs are not prohibited from applying immediately after the death of intestate, for a partition and appraisement. It is true, they are not protected from the debts of the decedent until after the lapse of seven years; but is it not right that they should be protected after that period?

Hopkins, in reply.

It would lead to great difficulty to give to purchasers from the heirs the protection of the statute. The husband, in the case in 6 *Serg. & Rawle* 267, is a purchaser, but does he purchase discharged from liens? In the orphan's court frequent distributions are made of intestates' estates, and in each stage the debts of decedent are paid. Unless this case prevail, the legislature must interfere and prevent the estate being taken within a certain time. The law exists

against the entire estate, not against the one sixth: each heir is bound to contribute towards payment; and a creditor of the estate is not bound by the transactions of the heirs among themselves. We have no statute like the one in Massachusetts, and the construction given to it can have no influence in the act under consideration. The case in *Serg. & Rawle* relates to parol liens: ours is so interwoven with the title that it cannot be separated.

The opinion of the Court was delivered by

KENNEDY, J.—Three errors have been assigned. There is, however, but one question involved in the case, and upon that the cause has been argued by the counsel. Does the fourth section of the act of 4th April 1797, entitled an act supplementary to the act directing the descent of intestate's real estate, &c., discharge the lands of deceased persons from liability to the payment of their debts after a lapse of seven years from the death of the debtors, in case no suit is commenced, or act done as therein required, in order to continue such debts a lien upon the lands? A proper solution of this question will decide this case.

In Pennsylvania, lands are liable as goods and chattels to be taken in execution and sold for the debts of the owner; and for this reason it must necessarily be, that the holders and apparent owners of them will and do obtain credit, and are enabled to create debts upon the faith of their being considered the owners; and immediately upon the death of a debtor his debts become a lien upon all his real estate: but the consideration just mentioned, that those who succeed to the possession and ownership of his lands will thereby gain a credit in the world, that without them they could not obtain, rendered it indispensably necessary to place this lien under certain regulations and limitations. Latent liens are not favoured, and have ever been discouraged with us, where lands have frequently changed their owners in almost as rapid succession as if they had been goods and chattels, or merchandise. This doctrine, and the policy of it, are very clearly illustrated, and most powerfully enforced in the case of *Kauffelt* and *Bower*, in 7 *Serg. & Rawle* 64. Great injustice as well as inconvenience must ever result from *secret* liens being permitted to continue without limitation under any circumstances whatever. If we restrict and confine the operation of the fourth section of the act of assembly of the 4th of April 1797, to *bona fide* purchasers for a valuable consideration of the lands of the deceased debtors, so as to protect them alone after the seven years, and not the heirs or devisees of the deceased, the consequences will be, that the creditors of heirs and devisees to the end of the chain after the seven years have gone by, and who may fairly be presumed to have given the credits upon the belief that the heirs and devisees who became their debtors were the absolute owners of the lands clear of incumbrances, as nothing was put upon record to apprise them of the contrary, will be defeated most unjustly of their claims, without the slightest degree of neglect on their part, or even any

thing that could be called imprudence. If seven years is not to be a bar to a proceeding against the lands of deceased debtors, to obtain payment of the debts, where nothing was done within that period to continue the lien as required by the act; when will it be prudent to trust the heir or devisee, on account of his being the owner and possessor of lands by inheritance or last will? Yet, under such circumstances of ownership, it is impossible to deny him credit; he will obtain it on account of the lands which he so holds. He may not know of the incumbrances himself, and therefore feels conscious that he is entitled to claim all the credit he asks. Have not he and they with whom he dealt good reason to believe that all the debts of the ancestor or testator were paid, as there had been no suits commenced or statements of them filed in the prothonotary's office within the seven years. It, however, turns out afterwards, that there are bond-debts in amount equal to the value of the lands still in existence, which remain unpaid, without any thing having been placed upon record as directed, to indicate their existence; and the heir has, in the meantime contracted debts equal in amount to the value of the lands, and then dies leaving them unpaid. They become, immediately upon his death, liens upon the lands. Now here are two sets of creditors, one of which must inevitably lose their debts; and which, upon principles of reason and common justice, ought it to be? If the question were to be decided upon this ground, those who are most free from blame ought to be preferred, and the law always does attach at least some degree of blame to negligence; and here I think it will be admitted, that negligence may well be imputed to the creditors of the ancestor, and that they have no right, therefore, to claim a preference. The maxim of law on this subject is, *vigilantibus et non dormientibus leges subserviunt.* They withheld from the public the means prescribed by the act for giving notice of their claims. This was gross negligence upon their part. They have thus indirectly encouraged the credits which were given to the heir of their debtor, and ought not, therefore, to be permitted to take away from those creditors the only fund out of which they can be paid. If they had placed their claims against the ancestor upon record in the manner required by the act of assembly, within the seven years, it is fair to presume, that the credit which was extended to the heir would not have been given. It is not material here, that no fraud was intended by them in their neglect to bring forward their claims as required by law; for the rule is, that if one of two innocent persons must suffer a loss of which one of them has been the occasion, it shall fall upon him who was the cause of it.

With respect to the fourth section of this act of the 4th of April 1797, it appears to me to be, to all intents and purposes, a statute of limitation and repose. In the case of the *Bank of North America* v. *Fitzimons*, 3 *Binn.* 359, 360, it is very properly spoken of as a part of a system which the legislature of the state have, by a series of acts, introduced and gradually matured against long continued liens on

real estates, from which great inconveniences had been encountered and many evils had arisen. It is a mistake to suppose that a regulation which limits liens, especially secret liens, which exist only in the knowledge or pockets of certain individuals, upon lands, does or can impair the claims, or injure in the main the rights of creditors; so far from producing such an effect, it has been found, by experience, to afford security and protection. Under this impression, as the chief justice of this court has said, in the case of *Kauffelt* v. *Bower*, 7 *Serg. & Rawle* 78, "the legislature has uniformly discouraged every other lien or incumbrance than those which arise from transactions which *appear of record*, and which therefore can prejudice no one, who uses proper diligence to ascertain the state of the facts: and even when liens are permitted, it has been thought that the *state of property*, as well as the *habits of the people*, required them to be laid under *severe limitations* and restrictions. Thus, by act of assembly, a judgment continues a lien but for five years, unless within that period it be revived by *scire facias*." And I will add, that of this we have a most full confirmation by an act passed since that, in 1827, limiting still more strictly the liens of judgments. If the continuation of those liens without limitation, which grow out of matters of record, and are open to the inspection of every body, and can therefore be readily known by all, be deemed so serious an evil as to require the most guarded restrictions imaginable, how much greater must it be in the case of secret liens. As long as they are kept from being placed upon record, there are no means furnished of ascertaining their existence or amount. Hence no man can tell when he is safe from the effect of them, either directly or indirectly. If those who claim to have such debts were to put them on record, as required by the act of 1797, it would afford an opportunity of knowing them who claimed to have such debts; so that every one interested might inquire and satisfy himself, and after that, govern himself accordingly. But is it not criminal in those who pretend to have those claims, to lie by without suing, or otherwise filing in the prothonotary's office a statement of them, where they are not payable within the seven years; in order to continue the lien and give notice of their claims, to attempt after that period has expired to take away the land for the payment of their debts, to the entire exclusion of the creditors of the heir who trusted him after the seven years had passed, upon the faith of his owning the land clear of incumbrances? To permit or sanction such a thing would, I think, be a direct violation of the act of 1797, and not only unjust, but culpable. It would be making the act a snare, to catch not merely the unwary, but such as the most cautious and vigilant could not always escape from.

It has been contended in this case, that the words of the preamble to the fourth section of the act of 1797 show, that the limitation, although expressed in general terms in the enacting part, was intended for the protecting of *bona fide* purchasers, and no others. There are certainly no negative words in this preamble, and the limi-

tation in the body being general and positive without the least qualification, the preamble, even if it were in its terms confined to purchasers, which I do not concede, ought not, without some other aid, to restrain and limit the general operation of the enacting clause. If purchasers were the only persons who could be injured by such secret liens being suffered to remain without limitation, there might be some reason for confining the enacting clause to purchasers, if they were the only objects presented in the preamble. In the *Bank of North America* v. *Fitzsimons*, the same argument was offered to restrain the operation of the general terms employed in the enacting clauses of the act of 1798, limiting the lien of judgments to five years, unless revived by *scire facias* within that period. The only mischief recited in the preamble of that act was, the risk and inconvenience that were produced to purchasers of real estate from judgments remaining a lien upon it for an indefinite length of time; the court however decided, that the preamble was insufficient to contract the enacting clauses, and that the lien of judgments should cease to exist after a lapse of five years, unless revived within that time against subsequent judgment creditors as well as purchasers.

The preamble to the fourth section of the act of the 4th of April 1797, is couched in the following words. "Whereas inconveniences may arise from the debts of deceased persons remaining a lien on their lands and tenements, an indefinite period of time after their decease; whereby *bona fide* purchasers may be injured, and *titles become insecure.*" It must be observed, that it is not the titles of the purchasers before mentioned that is here spoken of, more than the titles of any other persons, such as the *heirs* or *devisees* of the deceased debtors themselves, otherwise the words "*their* titles become insecure" would have been used. These two clauses are not necessarily connected so as to render the latter inoperative without the first; but may be considered as substantive and independent. The latter clause may be considered as referring to the insecurity that must attend the titles of the heirs or devisees of the deceased debtors, if the liens of their debts were suffered to continue beyond seven years from the deaths of such debtors, unless suits were commenced for them where they were payable within that time, or a statement of them filed in the office of the prothonotary of the county where the land might happen to lie, within the seven years from the deaths of the debtors, where they were not payable within that time. So far as the generality of the enacting clause of the section may be calculated to strengthen and support this construction, it is as full and ample as could be wished for. It declares, in the most general and positive terms, that the debts of no deceased persons shall remain a lien on their lands longer than seven years from their deaths respectively, unless sued for, or a statement filed within that time as already mentioned. Beside, all the arguments which were brought to bear in the case of the *Bank of North America* v. *Fitzsimons*, in support of giving to the enacting clause a construction co-extensive with

the generality of its terms, and sufficiently broad to embrace all the objects set forth in the preamble and enacting clauses taken together, come with double force here, where the liens intended to be limited are of a secret nature, not appearing upon record in any shape, and therefore of a much more dangerous as well as mischievous character.

Since the act of 1798, limiting the lien of judgments, was considered to extend to subsequent judgment creditors as well as purchasers, although purchasers alone were pointed out in the preamble as its objects, and this construction has since been expressly confirmed and approved of by the legislature, I think that we ought to observe the same latitude of construction of the fourth section of the act of 1797, which, in the preamble, as well as the enacting part, has terms sufficiently general, not merely to admit of, but to demand it, in order to guard against evils that otherwise would arise, of a more injurious and much more extensive nature. They are also parts of the same system of protection, and ought to receive such construction as will preserve the harmony and symmetry of it. This can only be done by giving, after the expiration of the seven years, a preference to the creditors of the heirs or devisees, over those of the ancestor or testator, who have slept and done nothing during that period to continue the lien of their claims. Now, with a view to apply this principle to the case before us and under our consideration, let us for a moment attend to the relative position of *Shep*, the creditor of the deceased ancestor, and *Hoch* and other creditors of *Jacob* the heir. The creditors of *Jacob* had sued him and obtained judgments against him for their debts, thereby clearly making them liens upon the land: and although the debt of *Conrad Shep*, the creditor of the deceased, became payable about the time of the death of the deceased, in January 1816, no suit was commenced for it until November term 1824, a space of nearly nine, instead of seven years; and this too after the creditors of *Jacob* had all obtained their judgments. Thus the creditors of *Jacob* had liens for their claims respectively upon the land, at a time when the debt of the creditor of the ancestor had ceased to be a lien. If the lien of *Shep*, the creditor of the ancestor, was extinguished by the operation of the act of 1797, upon the land, his obtaining a judgment afterwards could, upon no principle that I can conceive of, revive it, or renew to him in any manner a right which he had lost by his own neglect. While things were in this state, *Peter Rodermel*, one of the creditors of *Jacob* the heir, issued a *fieri facias* upon his judgment, by virtue of which the land was taken in execution, condemned, and afterwards sold by the sheriff, upon a *venditioni exponas*, issued for that purpose, as the estate of *Jacob* the heir, and the purchase money paid into the hands of the sheriff. And although *Shep* obtained a judgment for his debt against the personal representatives of the deceased ancestor, he never issued an execution upon it.

It is admitted, that the purchaser at the sheriff's sale will hold the

land discharged from *Shep's* judgment, but *Shep* claims to be paid first out of the money arising from the sale which is in the hands of the sheriff. Upon the same principle, that it is admitted that the purchaser at sheriff's sale will hold the land discharged from the debts of the deceased, that is, as a *bona fide* purchaser of the land, which is within the express provision of the act; it must also be admitted, that *Jacob*, the son, held his brother and sister's shares of the land, which was seven eighths of the whole, discharged from the same debts after the seven years had elapsed; for it cannot be gainsaid that he was a like purchaser of at least their portions in the land. This would necessarily limit *Shep's* claim, if not excluded altogether, to be paid out of that portion of the land which it may be said that *Jacob*, the son, held by descent, and not by purchase; to wit, one eighth part only. But the land was levied on and sold at the suit of the creditor of *Jacob*, the son, and as his estate. And can it be denied that he was the owner of it? Certainly not. The money thus made from the sale is to be appropriated to the discharge of the debts, which were liens upon the land at the time of the sale, according to their seniority. This I consider to be a well settled and established rule, without any exception, unless in the case of purchase money due to the commonwealth for the land, or in the case of mortgages falling within the provisions of the act of 1730. If *Shep*, then, had lost his lien upon the land for the payment of his debt at the time of the sale by the sheriff, I cannot imagine any principle known to the law upon which he can claim it out of the money; and without an entire disregard of the express terms and provisions of the act of 1797, it must be considered, that his lien upon the land was gone, and that the sheriff cannot withhold the money from the judgment creditors of *Jacob*, the heir, on that account.

This would be sufficient to affirm the judgment in this case, without deciding upon the effect of the limitation as respects the *titles* of the heirs and devisees to the lands which have descended and passed to them from the deceased debtors, after the seven years have run without suits being commenced, or statements of the debts being filed within that time, in conformity to the act, whether such heirs and devisees shall hold the lands discharged from the debts, where there are no creditors of the heirs and devisees to be injured by the debts of the ancestor or testator being paid out of them. Having protected the creditors of the heirs and devisees, I am not only willing, but feel myself bound by the provisions of the act, and what has been most indubitably the policy of the state, to extend the benefit of the limitation to the heirs and devisees, in order to make them secure in their titles. If such be not the true construction, a state of things must often arise that the legislature intended to provide against, and which would have required their direction, if it had not been thought at the time, that their act would in future prevent it.

In the first place I have to observe, that it has ever been the policy

of the state to encourage as much as possible the settlement and cultivation of all her lands, and to hold out every inducement that could be offered, to bring about rapidly the highest state of improvement in every point of view that could be imagined, not merely in changing the country from a wilderness into fine cultivated farms, and to put up permanent and commodious dwellings and other buildings upon them, but to encourage the building of cities, towns and villages, as also the establishment of manufactories in all favourable situations, and at the same time to embark herself in the making of canals, rail and turnpike roads to the fullest extent of her resources. But we all know, that unless the holders of lands are made secure in their titles, it is in vain that all other inducements are held forth to encourage them to improve them for almost any valuable purpose whatever. Partly with this view it is, that twenty-one years' adverse possession without even the shadow of right or title, will give a good title to lands by the policy of our law, to one who acquired his possession by an outrageous and forcible expulsion of the true owner, even where the title of the owner was upon record, and the ejector presumed to know all about it. How much more reasonable and just is it then, that the heir or devisee of land who has succeeded to the possession and ownership of it under the authority and sanction of law, and not in forcible violation of it, and who is in no wise to blame, should be protected against those claims which have slept and been kept secret for the space of seven years, that he may not only enjoy it in peace and safety, but that he may go on and improve it, for either agricultural, manufacturing or trading purposes, and thus advance the great interests of the state, as well as his own?

As it respects the rights and the security of the creditors of the deceased, I would ask, is not seven years time enough in all reason for them to prosecute their claims by suit, if payable within that time; if not, is it not sufficient time to file a statement in conformity to the act? All will join, I think, in answering in the affirmative. If a creditor will not observe the course pointed out by the act, and thereby loses the chance of recovering his debt, he has no reason to complain of the law; the fault, if any, was entirely his own.

I will again turn for a moment to what must often be the situation of heirs and devisees, if protection be not afforded them by this act Suppose that the lands, at the time that they come to the possession of them, were of little value, being rough, mountainous, unimproved lands, and have been made highly valuable by them in the construction of works, and extensive and costly buildings for the manufacturing of iron; are they to be made liable in this highly improved state, when the seven years have elapsed without any thing being done by the creditors, as required by the act, to secure the payment of their debts? Surely not. But if it be said, that the lands may be taken in execution and sold, and that the heirs or devisees shall be first paid out of the money arising from the sale made by the sheriff: But I ask, how is the value of the improvements to be ascertained; and

when; before or after the sale. If before, by what authority; and where has the law pointed out a course to be pursued to effect this, that shall be binding on all concerned? If after the sale, then I have no hesitation in declaring, that the property and the rights of the heirs or devisees must be most wantonly sacrificed in many instances without producing any thing for the creditors of the deceased; because, in nine cases out of ten, of such land so improved being sold by the sheriff for cash in hand, as it must be—it would not bring near, perhaps not one half of the value of the improvements, and hence the result must be loss and ruin to all concerned. It may, therefore, be fairly inferred, that the legislature intended, by the act, to protect heirs and devisees, as well as *bona fide* purchasers, otherwise they would have made some provision to obviate the difficulties and to prevent the sacrifices alluded to.

Again, if heirs and devisees be not considered as coming under the protection of the act, some of the inevitable consequences will be, that the elder branches of them, and those of full age, will sell out before, or immediately after the expiration of seven years, and leave the younger branches who are minors, helpless and incapable of either selling, or maintaining themselves, to be stripped of all that has descended or been given to them, by its being taken from them to pay the debts of the deceased, which have made their appearance after that the seven years have run. Thus the whole burthen of paying these debts is thrown upon the estates of helpless minors, while those, possibly of less merit, and generally more able to bear it, go clear. For I consider it settled in this state, that heirs or devisees who have sold and parted with the real estate or lands which come to them by descent or devise, and who of course have nothing of the deceased's estate remaining specifically in their hands or possession, cannot be sued for the debts of the deceased by his creditors. They must pursue the property: but if, that being in the hands of *bona fide* purchasers, it is discharged from their claims by the provisions of the act, I hold, that the heirs or devisees are discharged from all responsibility likewise, and that they will not be bound to make contribution to their co-heirs or devisees whose interests in the estate were taken and sold after the expiration of the seven years, and after the interests of those who had sold out were discharged by the operation of the act. They no longer stand *in æquali jure*. The debts were no longer a lien or burthen upon their rights or interests, and the estates of the minors were not taken to discharge them or their estates from claims that had an existence against either. Can it then be believed that the legislature intended to place minors in a worse situation, in respect to their patrimony, than those of full age? I think not. It would also have a tendency to deprive heirs and devisees of the full benefits and value of the estate, because, without limitation to protect them in the enjoyment of it, they would have no security for it that they could rely on with confidence, and would therefore seek the earliest opportunity of parting with it, and often do it at a great

sacrifice rather than run the risk of losing it altogether, and their improvements along with it, if they have been so imprudent as to make any.

The case of *Bruch* v. *Lantz*, 2 *Rawle* 392, has been relied upon as an authority by the counsel in favour of the plaintiff in this case. The decision in that case was not concurred in by all the members of the court, and was connected with some circumstances of fraud, upon which some of the members thought the cause turned pretty much. I have examined the report of it, and must confess, that the principle decided in it does appear to me to support very strongly the side of the plaintiff in error here, and under that impression I supposed that I might be mistaken with respect to what struck me as the true construction of the act of 1797. I, therefore, with a disposition to sustain it if I could, although not the decision of a full court, nor yet of all the members of it who heard the arguments, gave it a very careful examination, and regret that I cannot yield my assent to it. It is with great reluctance, too, that I withhold my assent from a decision of this court; and nothing but a conscientious conviction that there is error in it could induce me to depart from it, nor even then would I do so were I satisfied that it had become a rule of property; for I am aware of the advantages that are to be derived from the certainty of the law, and that nothing does contribute more to it than uniformity in the decisions of the courts.

Judgment affirmed.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT, SEPTEMBER TERM 1832.

Beirer *against* Bushfield.

In an action of slander the declaration set out, that the defendant had charged the plaintiff with having had criminal connection with a woman, and the innuendo explained the words to mean, that the defendant had thereby charged the plaintiff with the crime of adultery; a judgment for the plaintiff on this declaration was held to be good, although it was not alleged that the plaintiff was a married man.

A judgment in slander will not be reversed because the words are laid to have been spoken the day on which the writ issued, which was two days after the date of the præcipe.

ERROR to *Westmoreland* county.

This was an action of slander, in which *Samuel Bushfield* was plaintiff, and *David Beirer* was defendant. The words laid in the declaration to have been spoken were, "he was guilty with a woman, for he went into bed with *Mrs Kislar*, and stroked her, and he could prove it:" "thereby meaning that he, the said *Samuel*, had committed the crime of adultery with the wife of the said *John Kislar*." It was no where stated that the plaintiff was a married man. The præcipe, by which the action originated, was dated the 2d July; the writ issued on the 4th July; and the words were laid to have been spoken on the 4th July. The cause was referred to arbitrators, who made an award for the plaintiff, upon which judgment was entered; and to reverse which this writ of error was sued out, and the errors assigned were,

[Beirer v. Bushfield.]

1. That the words were not actionable.
2. That they are charged to have been spoken since the commencement of the action.

J. B. Alexander, for the plaintiff in error.
Kuhns, for the defendant in error.

The opinion of the court was delivered by

Gibson, C. J.—The objection is, that the innuendo has carried the meaning of the words beyond their natural import, by converting them into a charge of adultery by a man who is not alleged to have been married. The office of an innuendo is undoubtedly to fix the meaning of the speaker, by a reference to something gone before, where the abstract sense of the words would otherwise fall short of an imputation of legal criminality; and it is a rule, that where it enlarges the meaning without such a reference to an imputation which might subject the accused to an indictment or civil disability, it is fatal to the count even after verdict. If simple fornication, then, were not an indictable as well as a scandalous crime, I would say, this indictment contains no cause of action. But if the charge of that crime or adultery will indifferently support an action for words, why should the plaintiff be bound to discriminate very nicely between the charge of the one or the charge of the other? If it be doubtful which was meant, it surely cannot be material to the cause of action, that the defendant used ambiguous terms, when in either aspect the charge of an indictable offence was intended to be conveyed. Granting that the better course in doubtful cases is, to lay the charge in both ways, in order to leave to the jury to determine which was meant, yet it cannot be said, that in setting out his cause of action defectively in this respect, he has set out words which are not actionable in either sense; and less than that is insufficient to vitiate the count after an award which stands in the place of a verdict. But as no explanatory matter is laid as inducement, with which the innuendo can be coupled, why may it not be rejected as surplusage, the words being actionable without it? I admit it may not be done where the innuendo serves to make words actionable, which would otherwise not be so; for that would extract the sting from the charge as laid, and deprive the declaration of its substance. May it not be done, however, where explanation is superfluous, the words imputing a technical offence by force of their intrinsic meaning? I know of no case which forbids it. The objection, however, that the imputation of adultery, being laid as the ostensible cause of action, must be taken to have been the injury compensated by the jury, is not without a considerable share of technical force; for it would undoubtedly be of little importance that there was in fact a cause of action well charged, if it were not the one for which the plaintiff recovered. But it is notorious, that juries are governed by the case proved, instead of the case laid; and such a declaration as this, is

not one to require a departure from the broad line of demarcation already established, by tripping up a plaintiff who has recovered for a substantive cause of action of some sort, however inartificially laid. Beside, it is not too much to presume, if we are to have recourse to presumptions, that the jury gave damages for the cause of action laid, in that aspect in which alone it was maintainable; and the only thing laid here in contemplation of law, was an imputation of fornication. The question then is, whether these words are actionable when stripped of the meaning assigned to them by the innuendo; and after the decision in *Andrews* v. *Koppenheaffer*, 3 *Serg. & Rawle* 255, and *Walton* v. *Singleton*, 7 *Serg. & Rawle* 451, that the sense in which words are received by the world, is that which courts of justice are to ascribe to them, that question cannot admit of a doubt, for the words in this declaration convey to the popular apprehension a charge of fornication in terms less coarse though not less explicit than the most pointed that could be selected. The remaining objection, that the words are laid to have been spoken subsequently to the commencement of the action, is not sustained. The filing of the præcipe might be a good suing out of the writ to avoid the statute of limitations, but nothing short of its actual exit ought to defeat a meritorious action by an objection so sharp and technical.

Judgment affirmed.

Westmoreland Bank *against* Rainey.

The issuing of a *scire facias*, which is returned *nihil*, will not operate to continue the lien of a judgment beyond five years; nor will the issuing of a *fieri facias* so operate, since the passage of the act of 1827.

A plaintiff having two judgments, which are liens on real estate sold by the sheriff, cannot apply the proceeds to either judgment, at his option, by which indorsers may be affected; but the law will appropriate the fund to the older judgment, whose lien is regularly preserved.

WRIT of error to *Westmoreland* county.

This case originated on a writ of *scire facias* by the *Westmoreland Bank of Pennsylvania* against *Robert Rainey*, to revive a judgment against him. The parties agreed to consider the following facts in the nature of a special verdict.

"On the 4th of December 1816, *James Irwin* drew a promissory note in favour of *John Kirkpatrick*, for the sum of 700 dollars, payable at the *Westmoreland Bank of Pennsylvania*, which said note was indorsed by the said *John Kirkpatrick*, and afterwards by *Robert Rainey*, and discounted at the said *Westmoreland Bank of Pennsylvania*, as will more clearly appear by a copy of said note, which is made a part of this statement. That the said *Westmoreland Bank of Pennsylvania* afterwards had the said note regularly protested for non payment, and brought suit against the said *John Kirkpatrick*, to recover the amount of said note in the common pleas of Westmoreland to *August term* 1817, *No.* 79. The declaration being for money had and received, and not on the note, although the note was the sole cause of action. On which suit a judgment was obtained by default, on the 11th January 1819, as appears by the record and proceedings in said cause, which are made a part of this statement. *On the said judgment No.* 79, August term 1817, a writ of inquiry of damages issued to February term 1822, No. 62; and on the 14th February 1822, inquisition held and the damages assessed at 941 dollars and 89 cents; and on the 15th January 1823, a judgment was obtained on the inquisition, as appears by the record and proceedings in No. 62, February term 1822, which are made a part of this statement. That a *scire facias* to revive the judgment No. 62, February term 1822, issued to February term 1825, No. 12; in which a judgment was obtained the 1st February 1826, as appears by the record and proceedings in No. 12, February term 1825, which are made a part of this statement.

"That a suit was brought by the said *Westmoreland Bank of Pennsylvania*, to recover the amount due on the said note against *Robert Rainey*, the second indorser on said note, in the court of common pleas of Westmoreland county, to August term 1817, No. 80.

[Westmoreland Bank v. Rainey.]

The declaration being for money had and received, and not on the note, although the note was the sole cause of action. On which suit a judgment by default was obtained on the 11th January 1819, as appears by the record and proceedings in said cause, which are made a part of this statement. That a writ of inquiry of damages issued on the judgment No. 80, August term 1817, to February term 1822, No. 63; and on the 14th February 1822, an inquisition was held, and the damages assessed at the sum of 941 dollars and 89 cents; and on the 15th January 1823, judgment entered on the inquisition, as appears by the record and proceedings in No. 63, February term 1822, which are made a part of this statement. That a *scire facias* issued to February term 1825, No. 13, to revive the judgment No 63, February term 1822, in which a judgment was obtained on the 1st February 1826, as appears by the record and proceedings, which are made a part of this statement. To revive the last mentioned judgment, No. 13, February term 1825, the present writ of *scire facias* is brought.

"That the said *Westmoreland Bank of Pennsylvania* instituted a suit against the said *John Kirkpatrick*, to February term 1819, No. 89, on a note dated the 28th October 1818, drawn by a certain *Andrew Sterrett* in favour of a certain *John Ramsey*, indorsed by the said *John Ramsey*, and afterwards by the said *John Kirkpatrick*, for the sum of 15,250 dollars, payable at the said *Westmoreland Bank of Pennsylvania*. That on the 20th day of April 1819, the attorney of the said *John Kirkpatrick* confessed a judgment to the said *Westmoreland Bank of Pennsylvania* in the said suit, No. 89, February term 1819, for 15,518 dollars and 50 cents, as more fully appears by the record and proceedings in the said suit, No. 89, February term 1819, which are made a part of this statement. That at the time of entering the judgment in No. 79, August term 1817, to wit on the 11th January 1819, the said *John Kirkpatrick* was seised and possessed of different parcels of real estate in Westmoreland county, one parcel of which was sold by the sheriff of said county on the 1st of March 1826, on third *pluries venditioni exponas*, No. 85, February term 1826, on judgment No. 84 of August term 1817, *The Westmoreland Bank of Pennsylvania* against *John Kirkpatrick*. That, after paying off all liens against the said *John Kirkpatrick* prior to the 11th January 1819, the time of entering the judgment by default in No. 79 of August term 1817, there remained unappropriated in the hands of the sheriff, a sum sufficient to have discharged the amount due on the said judgment No. 79, August term 1817, if the same was a lien at and from the date of the judgment, to wit the 11th January 1819, and which sum yet remains in the hands of the sheriff unappropriated. That on the 19th February 1827, the court of common pleas of Westmoreland county made an order on the sheriff of said county to pay over the money arising from the sale aforesaid, in discharge of the oldest liens remaining unsatisfied against the said *John Kirkpatrick*, and on the 24th February 1831, a rule was entered

in said case, to show cause why said money should not be paid to judgment 89, February term 1819, which is undisposed of. That on the 31st August 1830, one other parcel of the real estate, of which the said *John Kirkpatrick* was seised and possessed on the 11th January 1819, and on which no liens existed prior to that day, was sold under a writ of *venditioni exponas* No. 72, August term 1830, on writ of *fieri facias*, No. 90, August term 1819, issued on the said judgment No. 89, February term 1819, the records in which cases are made a part of this statement. That a *scire facias* issued on No. 89, February term 1819, to February term 1829, No. 131, and an *alias scire facias* to August term 1830, No. 20. The records in which cases are made a part of this statement. That the money arising from the sale made on the 31st of August 1830, after the payment of the costs, amounted to 3932 dollars and 43 cents, which sum was paid by the sheriff of Westmoreland county to the said *Westmoreland Bank of Pennsylvania* on the judgment No. 89, February term 1819. That a large balance is yet due the *Westmoreland Bank of Pennsylvania* on judgment No. 89, February term 1819, exceeding the sum claimed by the plaintiff against the defendant in this suit. Towards the payment of which the plaintiff claims the appropriation of the money in the sheriff's hands, as before stated, and unappropriated. If, from the statement of facts in this case, the court should be of opinion that the plaintiff is entitled to recover from the defendant the amount of judgment No. 13, February term 1825, *The Westmoreland Bank of Pennsylvania* v. *Robert Rainey*, judgment shall be entered for the amount thereof with costs. If the court should be of opinion that the plaintiff is not entitled to recover the same in this suit, judgment shall be rendered for the costs of this and former suits on which this suit is brought."

The court below rendered a judgment for the defendant.

Foster, for the plaintiff in error, cited, *Pennock* v. *Hart*, 8 *Serg. & Rawle* 369.

Nichols, for the defendant in error; whom the court declined to hear.

The opinion of the court was delivered by

KENNEDY, J.—This was a writ of *scire facias quare executio non* sued out of the court of common pleas of Westmoreland county by the *Westmoreland Bank*, upon a judgment which it had in that court against the defendant in error, for the amount of a note which he had indorsed to the bank. The note was drawn by a certain *James Irwin* in favour of *John Kirkpatrick* or order, and indorsed by *Kirkpatrick* to the defendant. A judgment at the suit of the bank was likewise obtained against *Kirkpatrick* for the amount of the note. These judgments in favour of the bank against *Kirkpatrick* and *Rainey* were both rendered originally on the 15th of January 1823, and afterwards revived by writs of *scire facias* issued to February term 1825, in which

[Westmoreland Bank v. Rainey.]

judgments of revival were regularly entered on the 1st of February 1826. The amount of each judgment on the 15th of 1823 was, 941 dollars and 89 cents, besides costs of suit. The bank, on the 20th of April 1819, had got another judgment in the same court against *Kirkpatrick*, for the sum of 15,508 dollars and 50 cents, besides costs of suit. Upon this last judgment a *fieri facias* was sued out, returnable to August term 1819, and levied upon two tracts of land lying in Westmoreland county, then the property of *Kirkpatrick*, and continued to be so until they were afterwards sold by the sheriff of that county. The first on the 1st day of March 1826, under a third *pluries venditioni exponas*, sued out of the same court, at the suit of the bank, returnable to February term of that year; and the second tract on the 31st of August 1830, under a writ of *venditioni exponas* to August term of that year, upon the levy under the judgment last above mentioned. The money arising from this last sale, after paying the costs out of it, amounted to 3932 dollars and 43 cents. Upon this last mentioned judgment a writ of *scire facias* was sued out, returnable to February term 1829, upon which the sheriff made a return of *nihil;* and afterwards to August term 1830 an *alias scire facias* was sued out, to which the sheriff returned "served." The money arising from either sale was more than sufficient to satisfy the judgment for 941 dollars and 89 cents against *Kirkpatrick* and all prior liens, leaving out of view the judgment for 15,508 dollars and 50 cents; but the aggregate of both sales is not sufficient to discharge both judgments.

Upon these facts, which are collected from a statement agreed on by the parties in this case, and to be considered in the nature of a special verdict, the question arises, whether the judgment for 941 dollars and 89 cents against *Kirkpatrick* must be first satisfied out of the money made by either sale, before the application of it towards satisfaction of the judgment for the 15,508 dollars and 50 cents. For if it be that the money of either sale ought to be appropriated to the payment of the smaller judgment first, in preference to the larger, the law will make that appropriation of it in the hands of the bank, as it is the plaintiff in both judgments and has received the money of both sales, after satisfying the prior liens upon the lands sold.

Although the smaller judgment is of later date than the larger, yet the lien of it was continued and kept alive until after both sales were made. Its lien commenced with the date of the entry of it, on the 15th of January 1823, and, under a writ of *scire facias* issued returnable to February term 1825, was revived by the entry of a judgment for that purpose on the 1st of February 1826, which was sufficient to have kept it alive for the space of five years then next following. The larger judgment was entered, as we have seen, on the 20th of April 1819, and a writ of *fieri facias* sued out, not returnable to the August term following; under which a levy was made, and returned by the sheriff, upon the lands; from the sale of which by the sheriff, afterwards, the moneys arose, the appropriation of

which has given rise to this controversy. Under the construction put upon the act of 1798, limiting the liens of judgments upon the lands of the defendants to a period of five years, unless revived by *scire facias* in the manner therein prescribed by this court in the case of *Young* v. *Taylor*, 2 *Binn.* 218; and *The Commonwealth* v. *M'Kisson*, 13 *Serg. & Rawle* 144; this levy would have been sufficient to have continued the lien of the judgment upon the lands without a renewal every five years under the act, had it not been for the passage of the act of the 26th of March 1827, which has expressly required a renewal of a judgment every five years, in order to continue its lien, "notwithstanding an execution may have been issued within a year and a day from the rendering of such judgment." This last act, however, allowed two years from its passage for the revival of the liens of such judgments as were continued beyond the period of five years, merely by issuing execution thereon, &c. And by another act passed the 23d of March 1829, the time for this purpose was extended one year longer from that date.

It has been contended in this case by the counsel for the bank, the plaintiff in error, that the requisitions of these acts of assembly have been substantially complied with; and that the lien of the larger judgment has been continued and preserved. That a *scire facias* was sued out, returnable to February term 1829, which was within two years after the passage of the act of 1827; and that although this writ was returned *nihil* by the sheriff, and no other was issued until August term 1830, after an intervention of five terms of the court out of which the first writ of *scire facias* was sued, yet a continuance of the first *scire facias* may be entered from term to term, down to the issuing of the *alias* or second *scire facias*, and thus connect the second with the first, and give it a relation and retrospective operation, back to the date of issuing the first. It has been likened to the case when the plea of the statute of limitations has been avoided by the plaintiff's showing in his replication, that the process in the suit was issued within the six years, and returned *non est inventus* by the sheriff, and regularly continued on the docket or roll from term to term, until the time of declaring. *Salk.* 420, *pl.* 2; 421, *pl.* 6; 1 *Lord Raym.* 435; *Com. Dig.*, action on the case upon assumpsit *H.* 7; 3 *Term Rep.* 664; 1 *Dall.* 411; 12 *Johns. Rep.* 430. And that in such cases the continuances may be entered at any time. 6 *Term Rep.* 618; 7 *Term Rep.* 614. It has also been said, that this principle has been applied to, and sanctioned by this court in the case of a *scire facias* issued under the act of 1798, for the purpose of reviving a judgment and continuing its lien beyond the five years. *Pennock* v. *Hart*, 8 *Serg. & Rawle* 369.

In order to see whether or not what has been urged by the counsel for the plaintiff in error will be sufficient to answer the purpose, we must refer to the acts of the legislature upon this subject.

The second section of the act of the 4th of April 1798, *Purdon's Dig.* 421, declares, that "no judgment thereafter entered in any

court of record within this commonwealth, shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years from the first return day of the term of which such judgment may be so entered, unless the person who may obtain such judgment, or his legal representatives, or other persons interested, shall, within the said term of five years, sue out a writ of *scire facias* to revive the same."

The third section, which directs the course of proceeding on such writs of *scire facias* after that they shall have been sued out, enacts, that they "shall be served on the terre-tenants or persons occupying the real estates bound by the judgments; and also when he or they can be found, on the defendant or defendants, his or their feoffee or feoffees, or on the heirs, executors or administrators of such defendant or defendants, his or their feoffee or feoffees. When the land or estate is not in the immediate occupation of any person, and the defendant or defendants, his or their feoffee or feoffees, or their heirs, executors or administrators, *cannot be found, proclamation shall be made in open court, at two succeeding terms* by the oyer of the court in which such proceedings may be instituted, calling on all persons interested to show cause why such judgment should not be revived; and on proof of *due service* thereof, or *on proclamation having been made in the manner herein before set forth*, the court from which the said writ may have issued, shall, unless sufficient cause to prevent the same is shown, *at or before the second term subsequent to the issuing of such writ, direct and order the revival of any such judgment*, during another period of five years, against the real estate of such defendant or defendants; and proceedings may in like manner be had again, to revive any such judgment at the end of the said period of five years, and so from period to period, or after, as the same may be found necessary."

The sections of the act of 1798 not only direct the time within which a writ of *scire facias* shall be issued, for the purpose of continuing the lien of a judgment, but how it shall afterwards be served and upon whom; and in case the land be unoccupied, and the person or persons on whom it is ordered to be served are not to be found, that then proclamation shall be made by the crier of the court, at two succeeding terms; and in case of either a service of the writ or proclamation made as directed by the crier, and every case must fall within the one or other of these two classes, *the judgment of revival*, unless sufficient cause be shown, to prevent the same *at or before the same term subsequent to the issuing of the writ, must be entered.* Here is an express limitation of time, within which the judgment of revival may or shall be entered, unless sufficient cause be shown to the court to prevent it. I do not wish to be understood as saying that, unless sufficient cause be shown, that the judgment in all cases must be revived at or before the second term subsequent to the issuing of the writ, in order to keep the lien of the judgment alive; but I think it sufficiently manifest, from this part of the act, that the legislature intended that there should be no unreasonable delay in proceeding

upon the writ of *scire facias* after it was sued out. Now in the present case, the plaintiffs, without any manner of excuse, or cause whatever for it, have lain by, after suing out their writ of *scire facias*, and a return of *nihil* having been made to it by the sheriff, until five or six subsequent terms passed away, without issuing an *alias* writ of *scire facias*, or having *proclamation made*, or taking any step whatever in the cause, to manifest their intention of proceeding further in it. And during the interim the time allowed by the acts of 1827 and 1829 for issuing a writ of *scire facias*, and proceeding thereon, as directed by the three acts on this subject, expired. The doctrine of entering continuances, in case of a summons *ad respondendum* sued out by the plaintiff, and returned *nihil* by the sheriff, or of a *capias* returned *non est inventus*, ought not to have any bearing upon, or be applied to the case of a writ of *scire facias* sued out by a plaintiff under acts of assembly, for the purpose of continuing the lien of his judgment upon the real estate of the defendant; because I consider it repugnant, not only to the letter, but to the spirit and meaning of these acts. The plea of the statute of limitations was formerly looked upon by judges as odious, and entitled to no favour. Indeed, great astuteness and ingenuity were exercised by them to evade both the plain letter and meaning of the statute, but the judicial mind has been much reformed of late in regard to it.

In *Pennock* v. *Hart*, which has been relied on by the counsel for the plaintiff in error, it was held by this court, that where the *scire facias* was sued out within the five years, and returned *tarde venit*, and an *alias scire facias* was issued after the expiration of that period, and after one term had intervened, the process might be connected, and the commencement of the proceeding should be referred to the issuing of the original *scire facias*. Without overruling this case of *Pennock* v. *Hart*, it might, perhaps, be sufficient to say, that it is as different from the case under consideration as *one* is from *five*; or, if there be no difference between the intervention of five terms and one term, I do not see any reason why a distinction should be taken between five terms, and twenty or one hundred, and thus the lien of the judgment might be extended to an unlimited period, by suing out a *scire facias* within the first period of five years after the entry of it, and having a return of *nihil* or *tarde venit* made to it by the sheriff, and then after that, by entering the continuances upon the docket once in every succeeding term of five years, without suing out, *in fact*, any subsequent writ of *scire facias;* which, I think will be admitted by every one, would be a palpable disregard of the directions of the acts on this subject.

It may also be observed, that the return to the first *scire facias* in *Pennock* v. *Hart* was *tarde venit*, and not *nihil*. I consider *tarde venit*, if true, a proper return to the writ, because no act of the legislature will be construed to require an impossibility; but I doubt very much whether *nihil* is a sufficiently expressive return to answer what is required by the act of 1798, which has been partly recited.

[Westmoreland Bank v. Rainey.]

It is certain that *nihil* does not imply a service of the writ; and it is equally clear from the terms of the act, that the writ ought to appear, from the return of the sheriff made to it, either to have been served upon the person or persons mentioned in the act, or that "the land or estate was not in the immediate occupation of any person, and that the defendant or defendants, his or their feoffee or feoffees, or their heirs, executors or administrators could not be found." One or other of these two returns ought to be made substantially, in some shape, by the sheriff; if he have sufficient time before the return day of the writ to enable him to do so: if not, then he should return *tarde venit.* No other than one of the two first will entitle the plaintiff to a revival of his judgment, so as to continue in force its original lien according to the requisitions of the act. If, then, the return of *nihil* is to be considered as equivalent to, or substantially implying all that is required in the second case, where the land is unoccupied, and the defendant, &c. not to be found, the plaintiffs failed entirely to have their judgment revived by proclamation, as directed by the act. They, instead of seeking a revival of their judgment, agreeably to the provisions of the act, lie by for the space of sixteen or seventeen months, and then proceed by suing out another writ of *scire facias*, which shows that their counsel must have considered that the return of *nihil* was not such a return as entitled them to demand a judgment of revival by proclamation; or otherwise, they had slept too long, and suffered the time to pass by within which, according to the act, it should have been done. I am, therefore, decidedly of opinion, that the lien of the larger judgment had expired before the sales of the last tract of land; and it is plain that it cannot be claimed by the plaintiffs, to the exclusion of other lien creditors.

But it is contended, in the next place, that as there is no other than they who had a lien upon this last tract of land at the time of the sale of it, that they have a right to apply the whole of the money arising from the sale towards paying the larger judgment, although no lien on the land at the time of sale, to the exclusion of the smaller judgment, which was a lien at that time; because they are the plaintiffs in, and the owners of both judgments. I am inclined to think that the plaintiffs could not do this without the consent of the defendant in the judgments, even if no other person were interested in the appropriation of the money; but I give no decided opinion upon this point, as I deem it unnecessary to the decision of the present case. The object of the plaintiffs is obvious. They consider the security which they have for the payment of the debt in this larger judgment as insufficient, and therefore it is that they wish to have all the money arising from the sale of *Kirkpatrick's* property appropriated to the payment of it, and to make *Rainey*, who is bound only as an indorser, subsequent to *Kirkpatrick*, who is bound as the first, to the plaintiffs for the payment of the debt embraced in the smaller judgment, which was a lien upon the land at the time of the sale, pay to them the whole of this smaller

judgment. *Rainey* resists the application which the plaintiffs wish to have made of the money, and demands that the smaller judgment, for which he is liable, as the last indorser, shall be paid first out of it. It must be admitted that he has a deep interest in this matter; and as neither *Irwin*, the drawer of the note, nor *Kirkpatrick*, the first indorser of it, is able to indemnify or to reimburse *Rainey* the amount, or any part of it, if he were to pay it, it is manifest, that if the money arising from the last sale be not appropriated according to seniority of liens, or rather, if it be applied to the payment of a judgment that was no lien, in preference to one that was a lien at the time of sale, *Rainey* will be a loser to the amount of the smaller judgment. It appears to me that *Rainey* has a right at law, as well as in equity, to require that the lien judgment shall be first satisfied; because this is the order prescribed by law: again, if he had paid to the bank this debt, for which this latter judgment was entered against *Kirkpatrick*, he would in equity have been entitled to an assignment of the judgment, and to have been subrogated to all the rights of the bank, as both *Irwin* and *Kirkpatrick* were bound to keep him indemnified, upon the principle of their being principals with respect to him, and his standing in the relation of surety for them. The plaintiffs must, therefore, be considered as having received the money arising from the last sale, in satisfaction of the principal and interest due upon the smaller judgment, so far as it was necessary for this purpose, which, of course, extinguishes the debt and interest involved in the judgment of *Rainey* upon which the *scire facias* in this case was issued. The costs of that judgment, and of this suit by *scire facias* upon it, have never been paid, and cannot be claimed out of the money arising from the sale of *Kirkpatrick's* property: *Rainey* is still liable for the payment of them; and as this was all that the judgment of the court below was rendered for against him, it is conceived to be right, and, therefore, affirmed.

Judgment affirmed.

Shepherd *against* Watson.

When a right of way appurtenant to land is plainly conveyed by the terms of a deed, it is incompetent to prove by parol that it was not the intention of the parties that it should be conveyed. And upon such evidence having been given, it is error in the court to instruct the jury, that they must be governed in making their verdict by such evidence of the intention of the parties.

ERROR to *Alleghany* county.

This was an action of trespass *quare clausum fregit*, by *Rachel Watson* against *John Shepherd*. The only question was, whether the plaintiff had a right of way to a certain four feet alley. What gave rise to the question is fully stated in the opinion of the court.

Burke, for the plaintiff in error. Cited, 4 *Mass.* 496; 6 *Serg. & Rawle* 70; 1 *Serg. & Rawle* 227; 8 *Johns.* 304, 406; 3 *Johns.* 387.

W. W. Fetterman, for the defendant in error, cited, 1 *Rawle* 108.

The opinion of the Court was delivered by

KENNEDY, J.—This was an action of trespass *quare clausum fregit* brought in the court of common pleas of Alleghany county by *Rachel Watson*, the defendant in error, against *John Shepherd*, the plaintiff in error. Issues were joined upon the pleas of *non cul.* with leave, &c., *liberum tenementum*, and right of way. The only matter in controversy was, whether the plaintiff had a right to the use of an alley four feet in width, to the full extent of eighty-eight feet, along side of a messuage and lot of ground situate and being in the city of Pittsburgh, fronting on Diamond alley about fourteen feet, and extending back from the same southwardly, on a parallel with Wood street, eighty-eight feet.

The plaintiff below claimed under a deed of conveyance bearing date the 19th of July 1815, from *George Watson*, in whom it was admitted by both parties, that the right and title vested at the time of making the deed to her. The property conveyed by this deed is described in the following terms: "a certain lot or piece of ground, situate in the borough of Pittsburgh aforesaid (being part of the lot marked in the plan of said borough No. 351), bounded and described as follows: to wit, beginning on Diamond alley, at the distance of thirty-two feet westwardly from the corner of lot No. 352, and running by Diamond alley westwardly about fourteen feet to a *four feet alley*, thence *by the same* southwardly a parallel line with Wood street eighty-eight feet; thence eastwardly a parallel line with Diamond alley about fourteen feet; and thence northwardly a parallel line with Wood street eighty-eight feet, to the place of begin-

ning; together with all the buildings and improvements thereon; and together with the free use and privilege of the said four feet alley, also the buildings extending over the same."

The plaintiff in error claimed a right to this four feet alley in right of his wife, who was a daughter of the defendant in error, by virtue of a deed of conveyance, dated the 28th of February 1815, from the defendant in error to *Jane Watson*, the wife of the plaintiff in error. This deed was made in consideration of one dollar, and natural love and affection; and contains, by way of recital, a reference to the deed of conveyance from *George Watson* to *Rachel Watson*, and the same description of the lot and alley, without the least variation; and then conveys in fee simple to the wife of the plaintiff in error the lot of ground and use of the alley, describing them in the following terms: "all the aforesaid part of lot No. 351, with the buildings and improvements thereon; and together with the free use and privilege of the said four feet alley and the buildings extending over the same; and together with all and singular, the rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in any way appertaining."

On the trial, the plaintiff below called *George Watson*, the original grantor, as a witness, who, without objection, testified, among other things, that the right of alley terminated at the gateway into *Shepherd's* yard, immediately in the rear of the house, which was far short of the depth of the lot and the eighty-eight feet. And that no alley was laid out or right of way granted, except to the extent of the buildings; and that beyond the house no alley was used, except by the passing of one neighbour into the dwelling house of another.

Joseph Oliver, another witness for the plaintiff below, testified that there were buildings on the back part of the lot, and a passage all the way back.

Jacob Houp, a witness, produced on the part of the defendant below, among other things, testified, that there was a workshop on the back part of *Shepherd's* lot, and that *Shepherd* had been using the alley all the way back.

The defendant below also offered to prove, by *James M. Riddle*, the scrivener of, and subscribing witness to the deed of conveyance from *Rachel Watson* to the wife of the plaintiff in error, that it was the express understanding and agreement of the parties at the time of the execution of the deed, that the four feet alley extended back the whole depth of the lot (eighty-eight feet), and that the grantee was to enjoy it to that extent. This testimony was objected to by the counsel for the plaintiff below, and overruled by the court, and a bill of exception taken and signed, which is the ground of the second error assigned, and will be disposed of first.

Although it has been said that parol evidence may be admitted to explain a will, when doubtful, but not to contradict it, 2 *Ves.* 216, or, in favour of the legal operation of a will when it would be considered inadmissible if offered against it, *Taylor* v. *Taylor*, 1 *Atk.* 387,

yet I take it to be a general rule, well established, that parol evidence shall not be admitted to explain a writing, when the meaning is plain, and free from doubt. 2 *Stra.* 794; 3 *Wils.* 276, 277; 4 *Comyn's Dig.* 100, 101; 2 *Stra.* 1261. Nor yet to contradict, alter, add to, or diminish it. 1 *Dall.* 426, 340; 3 *Serg. & Rawle* 309. The deeds in the present case, by which the right to use the alley is granted, are couched in terms, both as to the granting of the use of the alley, and the width and extent of it, that are perfectly intelligible, plain and unambiguous; and being so, I am inclined to think that the evidence offered was not competent, and, therefore, properly rejected.

The only other error assigned, and which is the one chiefly relied on by the counsel for the plaintiff in error, is to the charge of the court; in which they told the jury, "that if from the facts testified to by the witnesses, taken in connexion with Mr *Watson's* testimony, with regard to the use of the passage, they were satisfied that it was the original intention of the grantor of the right of way, that it should extend no further than to give to the grantee an entrance into his premises, that then the plaintiff was entitled to their verdict."

Now it is evident, that no such original intention of the grantor is manifested by the terms or language of his deed. On the contrary, the lot granted thereby is described as bounded by the alley on the western side thereof to its utmost extent in depth from Diamond alley, that is, eighty-eight feet. The words in this part of the description are, "running by Diamond alley westwardly about fourteen feet to a *four feet alley*, thence *by the same* southwardly a parallel line with Wood street *eighty-eight feet*." The words are not "thence *by the same*, for instance, *thirty feet*, and next *by ground of A. B.* fifty-four feet, in all eighty-eight feet," as it ought and no doubt would have been if such had been the fact, and the agreement and understanding of the parties at the time. Or if it had been described more loosely, thus, "thence by the same and ground of A. B. eighty feet," it would have shown that the four feet alley was not the boundary of the lot granted throughout upon that side; and because it would have been doubtful in such a case, from the terms of the deed, how far the alley extended or was intended to be granted, it might perhaps have been proper to have introduced parol evidence of what was originally agreed on in this respect, and of the extent to which the alley had been laid out, opened and used on the ground. Since then the four feet alley is made expressly a boundary to the full extent of the eighty-eight feet or depth of the lot, it is perfectly clear from the terms of the deeds that the free use and privilege of it is expressly granted to the same extent, without qualification or restriction, to the wife of the plaintiff in error. The rule then which I have already noticed, that parol evidence shall not be admitted to contradict, alter, add to or diminish a written instrument, would have excluded the testimony of *George Watson*, which I have recited, if it had been objected to. When we reflect on the great uncertainty

of parol, and the comparative certainty of written testimony, the impropriety of substituting the former for the latter, and the gross injustice that would inevitably result from it, make it highly necessary that this rule should never be overlooked, nor yet departed from, except in cases of palpable fraud or plain mistake, when, in order to prevent injustice, parol evidence has ever been admitted. Hence, although the evidence was admitted without objection, I think that the court were wrong in telling the jury that the original intention of the grantor of the right as to the extent of the alley was to govern, and that that intention was to be collected from the facts testified to by the witnesses, taken in connection with it. This was in effect directing them, that if they believed the witnesses, their testimony ought to overrule and control the deed, and the plain intention of the grantor most clearly expressed in it, which ought not to be allowed unless in cases of fraud or mistake, neither of which is pretended here. The intention of the grantor, instead of being collected and ascertained from the parol evidence by the jury, ought to have been ascertained by the court from the deed itself, and given in charge to the jury, with a construction in conformity to it. The court ought to have instructed the jury as a matter of law, that the four feet alley, and the use of it, were granted by the deeds to the full extent of the eighty-eight feet or depth of the lot. The parol evidence of the manner and the extent to which the alley had been used by the grantees can not, and ought not to have been admitted for the purpose of producing any effect whatever in controlling or restricting the plain and express terms of the grant.

Judgment reversed, and *venire de novo* awarded.

Bartram *against* M'Kee, Clark & Co.

In an action brought in the common pleas to recover the price of carrying goods, the plaintiffs recovered a verdict and judgment for a sum less than 100 dollars, but which was reduced below that sum by a defence, on the ground of injury done to the goods carried; it was held, that the plaintiff was entitled to recover costs, although no affidavit was filed that his claim exceeded one hundred dollars.

ERROR to *Alleghany* county.

James A. Bartram brought this action against *M'Kee, Clark & Co.* to recover 300 dollars for carrying goods on the Ohio river. The defence was, that the goods were injured while in the possession of the plaintiff. The jury rendered a verdict for 99 dollars and 99 cents, upon which the court rendered a judgment with costs. To reverse the judgment as to costs, this writ of error was taken.

W. W. Fetterman, for plaintiff in error.

Burke, contra.

The opinion of the court was delivered by

Rogers, J.—If suit be brought in court for a debt, or demand, made cognizable by a justice of the peace, the plaintiff is debarred from costs, unless before issuing the original writ, he files in the office of the prothonotary his oath or affirmation, that he verily believes the debt due on damages sustained, exceeds the sum of one hundred dollars. Notwithstanding the words of the writ, it has been held in repeated cases, that when the verdict has been rendered, below 100 dollars by set off, the plaintiff was entitled to his costs. *Grant et al.* v. *Wallace*, 16 *Serg. & Rawle* 253; 2 *Dall.* 75; *Sadler* v. *Slobaugh*, 3 *Serg. & Rawle* 389; *Spear* v. *Jamison*, 2 *Serg. & Rawle* 531. This is not denied, but it is contended that this is not a set off, but an equitable defence.

Spear v. *Jamison* in its circumstances resembles this case. The demand was for work, labour and services, principally done, in making coal for the defendant's iron works. The defendant claimed a deduction, among other matters, on account of the badness of coal in consequence of which, as he said, his iron works were stopped for a great length of time. It was objected, that this defence might be made under the plea of *non assumpsit*, and that it was not a set off. The court allowed the plaintiff his costs, although it must be admitted that they did not expressly decide on the validity of this objection; but the court of common pleas, having decided that the plaintiff's demand was reduced by set off, it was not re-examinable here. This court would intend, in the absence of all proof to the con-

trary, that there was a set off. If necessary, the plaintiff might avail himself of the same position here. This matter has been examined by the court of common pleas, who can investigate the facts; and it is impossible for us, from any thing which appears on the record, to say there was error. But although this is not strictly a case of set off, yet the defence is collateral to the action, and seems to me to come within the exception to the letter of the act. As in *Sadler* v. *Slobaugh*, the defence was not for any certain sum of money; the verdict might have been for more than 100 dollars, but whether he should receive more or less than 100 dollars, would depend on the opinion of those who should try the cause. As then, the amount of the injury to the goods was uncertain, and the deduction dependent on opinion; it would be imposing a hardship, not within the extent of the evil, either to make it the duty to make the allowance, so as to reduce the claim within the jurisdiction of the justice, or to make an affidavit which would imply a doubt of its justice. If suit had been brought before a justice, for the freight, or in court, the defendant might decline making any defence, and bring a suit for the injury which he had sustained. He might allege, and truly too, that the injury was greater than 100 dollars, or the credit which the plaintiff had thought proper to allow. The consequence of which would be, that the jurisdiction of the justice would fail; or the plaintiff, after allowing for the injury which he supposed the goods had sustained, would have found himself exposed to a suit on the part of the plaintiff. I think it plain, that a recovery of freight would not bar a suit for the charge the plaintiff had suffered, as otherwise it might operate very much to the injury of the plaintiff, who would recover a verdict only, although his injury may have been much greater than the whole value of the freight. In *Sadler* v. *Slobaugh*, where the plaintiff brought debt in the common pleas, on a single bill, for 100 dollars, due on the sale of a horse, and where the demand was reduced because of a warranty of the horse, who proved unsound, it is put on these grounds. It was there, as in this case, a defence collateral to the suit, and not a set off, nor was he compelled to make the defence. The plaintiff could not make oath of his belief of what would be the result. It would be unreasonable to require it of him—the result depended entirely on the fact whether the defendant chose to make defence in that action, or preferred to bring a separate suit for the injury which he had sustained.

Judgment for the plaintiff for costs.

Brown *against* Campbell.

An execution issued and levied upon land preserves the lien of the judgment as to the land levied only; if no *scire facias* be issued within five years, the lien as to all other lands is gone.

THIS was an appeal from the decision of the circuit court of *Indiana* county, which appropriated the proceeds of the sale of the real estate of the defendant in error. And the only question which arose was, whether the issuing of a *fi. fa.* and a levy upon a particular tract of land, preserved the lien of the judgment upon other lands beyond the period of five years, without a *scire facias.*

Watts and *Alexander*, for appellants, contended,

That, according to the *existing laws* of the state, before the passage of the act of 26th March 1827, entitled "an act limiting the time during which judgments shall continue liens on real estate, and suits may be brought against sureties of public officers," it was understood that issuing an execution and levying on lands, which was done in this case, was such a continuance of the process of the law, as to render it unnecessary to revive the judgment by *sci. fa.*; and that the terms "existing laws," in the act of the 23d March 1829, a supplement to the foregoing act, had a reference to the case of *Young* v. *Taylor*, 2 *Binn.* 227, so far as it was understood to be a declaration that issuing a *fi. fa.* preserved the lien of the judgment.

By the act of 1829, one year from its passage is allowed for the purpose of having the judgments so situated revived, and the liens continued during that year.

In this case the judgment was revived within that year; that is to say, on the 29th of December 1829.

Per Curiam.—The argument, that the legislature meant to give permanency to what had been already done by the courts, though deemed to have been a misconstruction in the first instance, is plausible, but unsound. By the words "then existing laws," was doubtless meant, not only the text of the preceding acts, but the qualification it had received in practice. But though the legislature did not mean to interfere with any established practice as regarded the past, they evidently did not mean to give it the fixed form of positive enactment. To have done so, would have been deliberately to render the consequences of what they deemed error, irretrievable: an intent not to be imputed to them. They intended to leave the construction as to by-gone transactions exactly where they found it; in the province of the courts. But even supposing the words were

intended to give a statutory sanction to what had before been a matter of interpretation; still, the courts are to determine what were the existing laws, in the sense supposed, at the passing of the act; and it has already been decided, in a case not yet reported, that whatever may have been the interpretation put on *Young* v. *Taylor*, the practice of perpetuating a lien by an execution levied on any thing but the land itself, has never received the sanction of judicial decision; and this leads to exactly the same consequences, whether the construction contended for be put on the act of 1829, or not. Waving, then, all consideration of the regularity of this appeal, it is sufficient to affirm the position, that a specific levy of land continues the lien of a judgment only as to the land levied.

Decree of the circuit court and common pleas affirmed.

White *against* Willard.

The omission of the treasurer to file the bond, given for the surplus purchase money of a tract of land sold for taxes, does not vitiate the purchaser's title.

ERROR to the common pleas of *Mercer* county.

Ejectment. *Crawford White* purchased the land in dispute at a treasurer's sale for taxes in 1816, and then gave a bond for the surplus purchase money, beyond the amount necessary to pay the taxes and costs, and received his deed. The bond was mislaid by the treasurer, and not found until 1823, when he filed it in the proper office. The original title was in *Peter Willard* the defendant, whose counsel contended that the omission to file the bond was fatal to the plaintiff's title; and of that opinion was the court below, by whose direction a verdict and judgment were rendered for the defendant. This was the only point argued here.

Per Curiam.—The point contested here was certainly not decided in *Sutton* v. *Nelson*, 10 *Serg. & Rawle* 238, nor an opinion on it intended to be intimated. The word "filing" was carelessly used for delivering, on a supposition that the one would follow the other as a matter of course; but it was not supposed to be the business of the purchaser to attend to the duty of the officer, further than to see that he had the bond; or to make him answerable for negligence not his own. For whose benefit is the officer to perform this particular duty? Certainly for that of the former owner, who alone has remedy against him for a breach of it; and this shows that the purchaser is not the party to suffer by the officer's negligence. If then the purchaser has performed his part by delivering the bond,

he is not chargeable with negligence in remaining ignorant of the officer's omission for seven or any other number of years. But granting him to have been aware of the fact, yet not being a trustee for any one, it was not his business to interfere, which is still more conclusively shown by his total inability to control the officer's actions. There was error therefore in charging that the omission of the treasurer was fatal to the title.

Judgment reversed, and a *venire de novo* awarded.

Ross et al. *against* Soles.

In a suit before a justice of the peace, judgment was rendered for plaintiff for 40 dollars, from which the defendant appealed to the common pleas, where the cause was arbitrated, and an award for the defendant, from which the plaintiff appealed. The cause was afterwards tried by jury, and a verdict and judgment for the plaintiff for 17 dollars, the defendant having given other evidence than was given to the justice. *Held:* That the defendants were liable to pay the costs which accrued before the justice, and to refund to the plaintiff the costs which he had paid on the appeal from the award of arbitrators, and that each party should pay his own costs which accrued subsequently to the award.

ERROR to the common pleas of *Alleghany* county.

This was a question of costs, and the facts which gave rise to it are fully stated in the opinion of the court.

Burke, for plaintiff in error.
Fetterman, contra.

The opinion of the court was delivered by

KENNEDY, J.—The defendant in error sued the plaintiffs in error before a justice of the peace of Alleghany county, who gave judgment against them for 40 dollars debt, and four dollars and fifty cents costs. From this judgment, the plaintiffs in error appealed to the court of common pleas, where the cause was referred, under a rule entered by the plaintiffs in error, to arbitrators chosen agreeably to the provisions of the act regulating arbitrations passed in 1810. The arbitrators made an award in favour of the plaintiffs in error, and that the defendant in error pay the costs of the suit. The defendant in error appealed from this award to the court, where the cause was tried by a jury, and a verdict given in his favour for 17 dollars, upon which the court below adjudged that each party should pay his own costs up to the time of the appeal taken from the award of the arbitrators, but that the defendant in error, who was the plaintiff in the court below, should recover back from the plaintiffs in error their bill of costs, which he paid, for the purpose of tak-

ing his appeal from the award of the arbitrators, and further, that he likewise recover all his costs incurred subsequently to that appeal.

This case, I think, falls clearly within one of the provisions contained in the fourth section of the act of the 20th of March 1810, which is in these words, "but on the *reversal* or *abatement* of the amount of a judgment on an appeal, the defendant, if the appellant, shall be allowed his daily pay, counsel fee and costs, only in case he produces no evidence before the court other than that which he exhibited before the justice or referees." Now in this case the plaintiffs in error were the defendants before the justice, and became the appellants from his judgment to the court of common pleas; where finally, after producing other evidence than that which they exhibited before the justice, they obtained an abatement of the amount of the judgment of the justice. But then they gave new testimony which, according to the express provision of the act already referred to, deprived them of their right to recover costs. The payment and recovery of costs in this case must be regulated and governed by the act, a part of the fourth section of which has been recited, and not by the act regulating arbitrations of the same date. This suit was commenced before a justice of the peace, under the authority and provisions of the first of these acts; and wherever it *expressly* provides for and directs by which of the parties the costs shall be paid, or in what proportion each shall contribute to the payment of them, and which of them shall recover his costs or any part of them from the other, upon the final determination of the case, after an appeal taken by either party to the court of common pleas, it must be regarded and adopted as the rule of decision; notwithstanding there may have been an intermediate decision of the cause by arbitrators chosen under the latter act. It is possible, however, that in some cases of appeals from the judgments of justices of the peace, although none occurs to my mind now, that this latter act may be permitted to come in for the purpose of supplying an entire omission of the former as to costs.

If the defendants below had not given other evidence in court than that which was exhibited before the justice, they would have been entitled to have recovered costs, inasmuch as they succeeded in their appeal finally, by obtaining an abatement of the amount of the justice's judgment against them: but having given new evidence on the appeal, their right to recover costs is thereby gone, and each party in such case, according to the first of these two acts, and the decisions of this court upon it, must pay his own costs, from the time of the appeal from the judgment of the justice of the peace to the final end and determination of the suit.

The plaintiffs in error must pay the costs upon the judgment that was rendered against them by the justice; but each party must pay his own part of all the subsequent accruing costs in the suit. The plaintiffs in error entered the rule for the arbitration in the court below, upon which the arbitrators were appointed, who reported

against the defendant in error, which caused him to appeal; and before he could do that, he was compelled to pay the bill of costs of the plaintiffs in error. This he is entitled to recover back, otherwise it would be making him pay a part of the costs of the plaintiffs in error, which accrued after the appeal from the justice's judgment, instead of settling the matter upon the principle that when all shall have been paid, each party shall have paid his own costs and no more, which accrued subsequently to the appeal from the justice. It is perfectly just that the plaintiffs in error should refund their bill of costs to the defendant in error, who was compelled to pay them that he might get an appeal, in order to relieve himself against the award of the arbitrators, which was found afterwards to be unjust, and therefore was reversed, because the plaintiffs in error were the cause of this award.

This case falls directly within the principle decided by this court in *Honiter* v. *Brown*, 1 *Penn. Rep.* 477, 478, where *Honiter* was sued by *Brown* before a justice of the peace, who gave a judgment against *Honiter* for 80 dollars, from which he appealed to the court of common pleas, where the cause was referred to arbitrators, under the act of 1810 before mentioned. The arbitrators reported in favour of *Brown* 90 dollars, from which *Honiter* appealed a second time; and upon a trial afterwards in court, where he gave new evidence, not exhibited before the justice, obtained a verdict in his favour, upon which the court below rendered judgment, but decided that he was not entitled to recover back *Brown's* costs, which he was compelled to pay in order to obtain his appeal from the award of the arbitrators: this court reversed the judgment of the court below on this point, and decided that *Honiter* was entitled to recover back the costs of *Brown*, which he had so paid.

The judgment of the court below in this cause is reversed as to costs; and judgment that the plaintiffs in error pay the costs on the judgment of the justice; also that they pay back their bill of costs paid by the defendant in error to obtain his appeal from the award of the arbitrators; and that each party pay his own part of all the remaining costs.

Brentlinger *against* Hutchinson et al.

Whenever a question of abandonment of title, consisting of an actual settlement, arises from a lapse of time less than seven years, accompanied by circumstances from which it might be inferred that the party intended to abandon, it is a mixed question of fact and law, to be submitted to the decision of the jury.

But when the question arises from mere lapse of time, it is a question of law, to be decided by the court, without regard to the intention of the party; and if it exceeds seven years, it is a conclusive abandonment in law.

WRIT of error to the common pleas of *Indiana* county.

Ejectment for a tract of land by *William Hutchinson* and others, against *Jacob Brentlinger*. The facts of the case, which gave rise to the only question of law which was argued and determined, were thus accurately stated by his honour, who delivered the opinion of the court.

The defendants in error were the plaintiffs below, and claimed the land in dispute under a settlement right, and as the heirs of *David Hutchinson*, their father. A certain *Thomas Tate*, about 1800 or 1801, built a house upon the land, and moved into it with his family, where he resided, clearing some of the land, and raising grain. He cleared four or five acres in all, up to 1804, when he sold the land to *David Hutchinson*, the father of the defendants in error, and a certain *M'Govern*, and gave up the possession of it to them. They moved on to the land with their respective families; built an additional cabin upon it, and continued to reside there about one year, when *M'Govern* sold his interest in the land to *Hutchinson*, and left it. *Hutchinson* continued to live there till about the year 1810, when he removed from it about five or six miles off, for the purpose of teaching school. He left no grain growing on it; but left in the house where he had resided a loom, a couple of stools and a slab table, and fastened the door of the house. The house and land remained unoccupied and vacant for about a year, when *Adam Sides* took possession of it, under a claim which he pretended to have to it; sowed grain upon it, which he reaped the next. In 1811 *Catherine Hutchinson*, the wife of *David Hutchinson*, and her son, *William Hutchinson*, came upon the land, and were indicted by *Sides* for a forcible entry and detainer. *Catherine Hutchinson*, on trial, was found guilty, but no sentence or order of the court was ever made or imposed upon her. The son was acquitted. They left the land then, and some evidence was given that on quitting it, *Hutchinson* said he would try his right to it at law. From this time until about 1826 or 1827, it did not appear that any body resided upon the land, or even occupied it. In one of these years the plaintiff in error leased

it from *James Findley*, a son, and one of the administrators of *George Findley*, and under his lease took possession of it, and continued to reside upon it in 1829, when this suit was commenced by the defendants in error, as the heirs at law of *David Hutchinson*, who died in the year preceding. The deceased, when he removed from the land, and engaged in teaching school, in 1810, was very poor, and "*had hard scrabbling*," as one witness said, "*to get along*."

The defendant below, beside his possession, which he relied on, among other things, gave in evidence a warrant for three hundred acres of land, adjoining the Laurel Hill and *Michael Huffnagle*, granted to *David Wilson*, and bearing date the 17th of April 1786, upon which a survey was made the 11th of August 1787, containing three hundred and three acres, adjoining *George Findley*, and returned into the surveyor-general's office on the 28th of March 1794. To show, however, that this warrant and survey had been revoked in its location upon the land in dispute, under the provisions of the first and second sections of the act of the 29th of March 1792, *Purdon's Dig.* 527, the defendants gave in evidence a certified copy from the surveyor-general's office, of the certificate of *John Moore*, the then deputy surveyor of the district, dated the 25th of April 1794, showing that unappropriated land was not to be had for this warrant; and then the certificate of *Daniel Broadhead*, the surveyor-general, directed to the receiver-general, and dated the 10th of May in the same year, showing that *Daniel Wilson*, the warrantee, was entitled to a credit in the land office, upon the faith of the deputy surveyor's certificate for the amount of the moneys paid by him for the warrant. The defendant below objected to the admission of these certificates in evidence; the court overruled the objection, to which the counsel for the defendant below excepted, and a bill of exception was allowed and signed by the court.

The defendant below also gave in evidence another warrant, dated the 19th of November 1808, for two hundred and seventy-five acres, interest to commence from the 1st of November 1794, which was granted to *George Findley*, and a survey made thereon of two hundred and ninety-nine acres and sixty-four perches, the 20th of June 1811. It was also testified that both *Sides* and *George Findley* claimed the land at one time, and a deed of conveyance from *Sides* to the administrators of Findley, dated the 9th of March 1816, for the land in dispute, was given in evidence. It did not appear in evidence, on the trial, that *George Findley* ever had any settlement upon the land, to authorise his obtaining a warrant for it. The jury, after receiving the charge of the court below, returned a verdict in favour of the defendants in error, upon which the court rendered a judgment.

Stannard, for plaintiff in error.
White, for defendant in error.

[Brentlinger v. Hutchinson.]

The opinion of the court was delivered by

KENNEDY, J.—Seven errors have been assigned by the plaintiff in error, none of which, excepting the sixth, are considered sustainable by this court. Indeed, the sixth is the only one that was pressed and relied on by his counsel, at the time of argument here.

The sixth error is, that the court below, in their charge to the jury, directed them that they ought not to presume an abandonment by *Hutchinson* of his settlement right to the land in dispute.

From 1811, the time when the wife and son of *David Hutchinson* were on the land and left it last, until the commencement of this action of ejectment, a period of eighteen years, neither he, although he continued to live seventeen years of that time, nor his heirs, after his death, ever made the least effort, that we have heard of, to recover or take the possession of the land again. The only excuse or apology that has been offered for this delay and lying by is, that he wished, as he said, when he left the land last, in 1811, "to try his right at law to it," and that no person took actual possession of it afterwards, to afford him the opportunity of bringing an action of ejectment, until *Brentlinger*, the plaintiff in error, came on it. But, it must be recollected, that that was in 1826 or 1827, at least one, if not two years before *Hutchinson's* death, which was ample time for him to have brought his suit in, if he had intended it. Again, if he had really been desirous to have *tried his right at law*, and seeing that no one took possession of, or occupied the land in any way, it would have been more safe, as well as more wise, for him to have returned to the land with his family, or, otherwise, to have got a tenant to have done so, and to have entered upon and held the possession of it, until it was taken from him by process of law. If he had done so, his adversary, if disposed to contest his right, must, in that case, have become the plaintiff, and made *Hutchinson* the defendant, which, as every one knows, is a very material advantage gained in action of ejectment. And if being thus in possession of the land, his adversary had declined bringing a suit for the recovery of it, he, of course, would have held it without the vexation, trouble and costs necessarily attending upon a suit at law. This would surely have been the utmost that he could have wished. I must, therefore, consider the circumstances of the land lying vacant and unoccupied for so great a length of time as fifteen or sixteen years, instead of making in favour of the plaintiff below, or furnishing the least excuse for lying by, and not resuming the possession of it, and again making it the place of his abode, as one of the strongest reasons that could be well imagined, for inferring an *intentional abandonment* on the part of *David Hutchinson.*

The definition of a settlement upon land, is given in the act of assembly of the 30th of December 1786, which has been considered nothing more than declaratory of what was the common usage and law in relation to it before that time, as well as since. *Clark* v. *Hutchinson*, 3 *Yeates* 269. It is thereby declared, "that by a settle-

ment, shall be understood an *actual personal resident settlement*, with a *manifest intention* of making it a place of *abode*, and the *means of supporting a family*, and *continued from time to time*, unless interrupted by the enemy, or by going into the military service of the country during the war." Again, by the act of the 22d of September 1794, it is enacted that, "from and after the passing of this act, no application shall be received at the land office, for any lands within this commonwealth, except for such lands whereon a settlement has been made, or *hereafter* shall be made, *grain raised*, and a *person or persons residing thereon*." It appears from these acts of the legislature, as well as every other relating to the same subject, that *continuity of possession*, and *personal residence* of and upon the land, are made the very essence of a settlement. By the first act it must have been *continued from time to time*, unless interrupted by the enemy, or going into the military service of the country during the war; showing that nothing but the *force of a public enemy*, or a *demand for his service in the defence of his country against such enemy*, would excuse, or be received as such from a settler, for quitting his possession. And by the second act it is apparent that this *continuity of possession* and *personal residence* was considered of so much importance, that no application for a warrant was to be received at the land office, unless the applicant, or some one or more under him were *actually residing* on the land at the time of the application. Thus demonstrating, most clearly, that no previous settlement, however long continued, or however extensive and valuable the improvements upon the land might be, would, unless the personal residence were kept up and continued, avail, and entitle the settler to a warrant for the land.

The late Chief Justice *Tilghman*, in delivering his opinion in the case of *Cluggage* v. *Duncan*, 1 *Serg. & Rawle* 120, 121, says, "abandonment is not in all cases a matter of fact. It may be a conclusion of *law* from *facts*. Where a man makes a settlement and *leaves it for a great length of time*, it does not signify for him to say, that he keeps up his claim. The law declares that such *verbal claims* have no avail against the *act of relinquishing the possession*. And in such case I consider it as the right of the judge to declare the conclusion of law." And in a later case, *Watson* v. *Gilday*, 11 *Serg. & Rawle* 340, where Mr Justice *Duncan* delivered the opinion of this court. He says, "a man may abandon his settlement, and that abandonment may be of such a cast as that the court will decide it as a *matter of law*, independent of the statutory provisions of limitation as to seven years, because *continuity* of actual residence and possession, is the very vital principle of this right, and is a part of its legal definition. Hence it is determined that settlements must not have the smallest cast of abandonment. The abandonment, then, is not constructive, but absolute; a *dereliction of the possession*, which amounts to a surrender of the pre-emption right, *unless this dereliction is accounted for by some extraordinary occurrence*, as being dispossessed *by force*, and an *immediate prosecution of the right*, or pro-

secution *within some reasonable time*, or being driven off by the public enemy."

By the fifth section of the limitation act passed the 26th of March 1786, persons who had claims to land founded upon settlement, improvement or occupation, without other title, were debarred from bringing actions for the recovery of them, unless they or those under whom they claimed had had the quiet and peaceable possession of the same within seven years next before bringing their actions. This section of this act was considered so just and reasonable, that it was, for a considerable time after its passage, applied by the courts of the state to cases where settlers had left and deserted the possession of the lands held by their settlements, subsequently to the date of its passage. It has however of late, from its terms, been held to extend only to cases of abandonment before that time. It is certainly true that it is retrospective in its terms: but then it shows what was at that time considered by the legislature the utmost indulgence that ought to be allowed to a settler who had quitted his settlement and improvement, to resume the possession of it again.

One thing however is demonstrated most clearly by this section, taken in connection with the third section of the act, that the legislature intended that settlement-rights should not be placed on the same footing with titles held under locations or warrants and surveys returned into the surveyor-general's office, because the third section allowed to all such, who were not in possession at that time, and where adverse possession of the land had been taken and was held by others fifteen years, to bring suits for the purpose of recovering the possession thereof; whereas no time was allowed to those who claimed merely by settlement right, unless where they had been driven off by force or terror of the savages or other persons, &c. and in that case they were only allowed *five years* for regaining their possession. It is impossible for us to close our eyes against all the various provisions and directions of the legislature at different times on the subject of settlement-rights to land: first, in defining what shall constitute a settlement, and how the residence and possession shall be kept up and continued in order to make it available; and in the next place treating it as a privilege that is granted without consideration, and if the possession be relinquished without good cause for any length of time, a forfeiture may be declared without time given for redemption. I am not now to be understood as speaking of settlements made upon land lying north and west of the rivers Ohio and Alleghany and Conewango creek, because I look upon settlements made there as part of the consideration stipulated to be given to the state for the land under the act of the 3d of April 1792, and are to be of a certain extent and of certain duration.

It has been said that settlement rights are of more value and more to be regarded in law now than formerly: that is true; but since the legislature have acted upon the matter and defined what they shall be, and how they shall be kept up and continued, no estimation

can be put on them that is not authorised by what they have been pleased to declare and direct. Whatever these rights were immediately after the act of the 22d of September 1794, they must be now nothing more or less. Since that, the legislature has made no change whatever in respect to their nature and character. In 1795 in the *Lessee of Howard* v. *Pollock*, 1 *Yeates* 512, they were classed among the *imperfect rights*. In the same year in the case of the *Lessee of Smith* v. *Brown*, Chief Justice *M'Kean*, who pronounced the opinion of the court, says, "there are three kinds of rights: *jus proprietatis*, *jus possessionis* and *jus vagum* or an imperfect right; settlements may be ranked among the latter species. It is *a right to pre-emption; a claim to favour.* And as late as 1824, in *Smith* v. *Oliver*, 11 *Serg. & Rawle* 266, the present chief justice of this court calls a settlement right a " mere equity:" and therefore it was decided in that case, that one could not be seised of an improvement right for the use of another.

Upon the principle of *continuity* of possession and *residence*, which is so *expressly* required by our acts of assembly on the subject, it has been decided that the same "man cannot be an actual settler on two tracts of land:" and that the title of the settler does not depend on the extent of his improvements, but on the *animo residendi* and the possession continued. See *Lessee of M'Laughlin* v. *Maybury*, 4 *Yeates* 537, 538. It is obvious a man can have but one place of *abode* at the same time. To constitute a settlement right to land, the settler, as we have seen, is required by the acts of the legislature to make the land the place of his *abode* and to continue it; the moment therefore that he changes and fixes his *abode* elsewhere, unless driven to do so by force or he enters into the military service of his country in defence of its liberty and rights, the former ceases to be his place of abode and his right to it by settlement would seem to cease also, upon a literal construction of these acts.

In *Star* v. *Bradford*, 2 *Penns. Rep.* 384, where a descriptive location was obtained by one in 1769 who had a survey made on it, and a warrant by another in 1784 who had a survey made and returned but no return was made of the survey on the location until 1788; it was held and decided as a question of law by this court, without taking into the account the time that the land office was closed during the revolutionary war, that the neglect on the part of the owner of the location in not having a return made earlier of his survey, was an abandonment *in law* of his right under it and was therefore postponed to the right under the warrant. Mr Justice *Rogers* who delivered the opinion of the court in that case seemed to think that the time allowed for making a return of the survey in such case ought not to exceed seven years upon principle of analogy to the fifth section of the limitation act of the 26th of March 1786; and that as often as the question of abandonment arises for mere lapse of time, where there is no dispute as to length of it, it is a *question of law to be decided by the court* without regard to the inten-

tion of the party. In this sentiment or rule I most fully concur; and agree also that the limitation of time should not be permitted to exceed seven years. It is surely of great importance to the community, as well as individuals, that the rule on this subject should be fixed, uniform and known. I would also say that wherever the question of abandonment is made upon a lapse of time less than seven years, accompanied by circumstances from which it might be inferred that the party *intended* to abandon, that it was a mixed question of fact and law to be submitted to the decision of the jury. It is certainly the law that a party may abandon at any time, within seven days if he chooses, and wherever he has relinquished the possession of the land within less than seven years, it would become a matter of contention then to be settled by the jury.

In giving this indulgence to an actual settler, I am far from being perfectly satisfied that it may not be in opposition to the will and intention of the legislature, as it has been manifested in their acts on this subject; but still I think it would be sufficient to give repose and quiet to the public, and at the same time afford ample security to the rights of individuals. The most formidable objection which I see against extending the indulgence to seven years is, that it may often prevent the state from disposing of the land to others who are willing and desirous to pay the state for it, and might savour of the idea of enabling one person to hold two or more tracts of land by settlement right, by shifting and changing his possession and residence from one to another once in every seven years, until he went around the whole, which I am strongly inclined to believe was never intended.

In the case under consideration, however, not only seven, but at least seventeen or eighteen years elapsed from the time that *Hutchinson* lost, left, and relinquished the possession of the land, before he, or those claiming under him, made any attempt to recover it. And in the absence of all colourable excuse for this long delay, I have no hesitation in saying that there was an abandonment in law of his right by settlement, and that the court below ought to have told the jury so, instead of directing them that an abandonment ought not to be presumed.

The judgment of the court below is reversed.

Adams et al. *against* M'Ilheny.

A plaintiff having appealed from the judgment of a justice of the peace against him, recovered a judgment in his favour in court. *Held*, that he was entitled to have a judgment for full costs.

ERROR to *Alleghany* county.

William M'Ilheny sued *William Adams* and *George M'Bride* before a justice of the peace, who rendered a judgment for the defendants, from which the plaintiffs appealed, and recovered in court an award for 13 dollars, upon which a judgment was rendered for that sum and costs; to reverse which, as to costs, this writ of error was sued out.

Selden, for plaintiff in error, cited, 17 *Serg. & Rawle* 366.

W. W. Fetterman, contra, cited, 1 *Rawle* 426; 16 *Serg. & Rawle* 296; 1 *Penns. Rep.* 23.

The opinion of the Court was delivered by

KENNEDY, J.—It appears by the final determination of this cause, that the defendant in error had a just claim against the plaintiffs in error for 13 dollars, which they wholly refused to pay. It may therefore be well said, as it was in *Lamb* v. *Clark*, 17 *Serg. & Rawle* 366, that they have been "the efficient cause of the costs being incurred," both before the justice and in court, and for this reason, if there be no law to militate against it, ought to pay them. From the act of the legislature giving to justices of the peace jurisdiction in certain cases growing out of contracts, I am inclined rather to think that it was not their intention to exonerate a defendant from the payment of costs, where he stood justly indebted to the plaintiff, and without any good reason had entirely refused to pay. Neither do I conceive that it was their design to repeal or alter the statute of Gloucester in respect to the recovery of costs, further than they have made a different provision on the subject. I feel satisfied that the right of the defendant in error to recover costs is not taken away by the act of assembly; and if not given by it, he is entitled to them under the statute of Gloucester.

The award of the arbitrators and judgment are therefore affirmed.

Commonwealth *against* Baldwin.

A confession of judgment, "sum to be liquidated by attorney," operates as a lien upon the defendant's real estate, although not afterwards liquidated.

A judgment in the name of the treasurer, for the use of the commonwealth, is substantially a judgment of the commonwealth, so as to exempt it from the operation of a statute, limiting the period for which a judgment shall continue a lien.

The lien of a judgment in favour of the commonwealth is not lost by lapse of time.

FROM the common pleas of *Alleghany* county.

This was an appeal from the decree of the common pleas, appropriating the proceeds of the sale of the real estate of *Baldwin*. A suit was brought to January term 1810, in the name of "*the Treasurer for the use of the commonwealth of Pennsylvania*," against *Baldwin*, in debt for 10,201 dollars. "5th April 1816, Mr *Baldwin* confesses judgment, sum to be liquidated by attorneys." No liquidation was ever made. When this judgment was entered, the defendant was seised of certain lands, which subsequently, on the 19th September 1816, he mortgaged to the Bank of Pennsylvania. Upon the sale of these lands, in 1830, the money was brought into court for appropriation, when the questions arose:

1. Did the judgment ever operate as a lien?
2. If it did, is the lien lost by lapse of time?
3. If the state be exempt from the operation of the acts respecting the revival of judgments, is a judgment in favour of the treasurer, who sues for the use of the state, also exempt?

T. B. Dallas, for appellant, cited 2 *Atk.* 385; 16 *Serg. & Rawle* 347; 11 *Serg. & Rawle* 94; 5 *Cranch* 88; 15 *Serg. & Rawle* 177; 9 *Cranch* 203; 3 *Wheat.* 631; 2 *Cranch* 386; 2 *Overton* 118; 1 *Dall.* 178; 4 *Serg. & Rawle* 166; 2 *Peters's S. C. Rep.* 662; 6 *Com. Dig.* 28; 1 *Black. Comm.* 298; 7 *Dane's Dig.* 426; 1 *Call* 194, 475; 3 *Call* 220.

Brackenridge, contra, cited, 2 *Serg. & Rawle* 142; 16 *Serg. & Rawle* 348; 5 *Binn.* 77; 3 *Serg. & Rawle* 291; 16 *Serg. & Rawle* 250; 18 *Johns.* 227; 9 *Wheat.* 735; 1 *Peters's S. C. Rep.* 326.

Ross, in reply, cited, *Act of 28th March* 1806; *Levinz* 71, 72, 73; 1 *Bac.* 149; *Moore* 672; *Plowd.* 136; 1 *Dall.* 58.

The opinion of the Court was delivered by

GIBSON, C. J.—In a monarchy, the exemption of the sovereign from the operation of statutes in which he is not named, is founded in prerogative; and hence it is supposed, that no such exemption

can be claimed, for a sovereign constituted of the people in their collective capacity. It is certain, that so much of the prerogative as appertained to the king by virtue of his dignity, is excluded by the nature of our government, which possesses none of the attributes of royalty; but so much of it as belonged to him in the capacity of *parens patriæ*, or universal trustee, enters as much into our political compact, as it does into the principles of the British constitution. Why should it not do so peculiarly, where the maxim *salus populi* is the predominant principle of a government, to whose operations and well being, the prerogative is as essential as to those of a monarchy? The necessity of it, in regard to statutes of limitation, is peculiarly apparent. The business of every government is necessarily done by agents, chosen, in a republic, by the people, it is true, but still no more than agents, and chosen certainly with no greater attention to the qualification of vigilance, than are the agents of an individual, whose utmost care in the choice of them is excited by the interest which he has directly in the event; and the frequency of miscarriage in any business, managed even by these, need not be pointed out. There is a perpetual tendency towards relaxation, where exertion is not invigorated by the stimulus of private gain; and this is the greater where the functions of the officer are to be performed, not under the supervision of an employer immediately concerned, but before the eyes of those who have no other interest in the business, than the remote stake which they have in the public prosperity. To some extent, therefore, and in proportion to the want there happens to be of systematic accountability in the respective departments, remissness of its ministers will be found in every government; and it is a principle, not only of great practical value, but of the first necessity, that the legislature shall not be taken to have postponed a public right to that of an individual, unless such an intent be manifested by explicit terms (as it has been in the order of paying a decedent's debts), or at least by necessary and irresistible implication. In the *United States* v. *Kirkpatrick*, 9 *Wheat.* 720, and the *United States* v. *Vanzandt*, 11 *Wheat.* 184, it was ruled that the laches of the public officers, however gross, does not discharge a surety from an official bond; and the principle of these cases was again recognised in *Dox* v. *The Postmaster-General*, 1 *Peters's S. C. Rep.* 326. In the construction of statutes of limitations, this salutary principle has been retained, I believe, by the courts of all our sister states; at least, I have not found a decision by any of them inconsistent with it, while by many it has been distinctly asserted. It was thus held in *Weatherhead* v. *Bledsoe*, 2 *Tennessee Rep.* 352. In Kentucky, the distinction which I have intimated, has been taken between the prerogative which relates to the government, and that which relates to the person of the king; by reason of which, the state was held not to be barred in a personal action by a statute in which it was not named. *Commonwealth* v. *M'Gowan*, 4 *Bibb* 62. In the case of *Nimmo* v. *The Commonwealth*, 4 *Hen. & Munf.* 57, it is said that the

[Commonwealth v. Baldwin.]

English maxim *nullum tempus*, has been adopted in Virginia; and that statutes of limitations do not extend to the commonwealth, in civil suits, not founded on any penal act in which the commencement of the action is expressly limited; on which principle it was determined, that no length of time bars the commonwealth from having execution of a judgment, or subjects her to the necessity of suing out a *scire facias*. The same principle ruled the cause in *Kemp* v. *The Commonwealth*, 1 *Hen. & Munf.* 85, which was the case of a personal demand prosecuted by motion—a mode peculiar to Virginia; and there are, I believe, other decisions to the same effect in that state. In Maryland, the doctrine is distinctly asserted, in *Cheny* v. *Ringgold*, 2 *Harris & J.* 87; *Hall* v. *Gittings*, 2 *Harris & J.* 112; *Stewart* v. *Mason*, 3 *Harris & J.* 531, and perhaps some other cases: as it is in New York, in *The People* v. *Gilbert*, 18 *Johns.* 227, and *Wilcox qui tam* v. *Fitch*, 20 *Johns.* 422. In *Stoughton* v. *Barker*, 4 *Mass.* 428, Chief Justice *Parsons*, and all the judges of the supreme court of Massachusetts held, that a condition or limitation for the benefit of the public is not extinguished by any inattention or neglect, in respect of compelling the owner to comply with it. There may be decisions to the same effect in other states, which have escaped my research; but those already cited would be entitled not merely to respect, but a commanding influence, even were the question in Pennsylvania an open one. We have, however, but a single case, in which the naked point was directly presented for adjudication. The public lands have been open to entry for the purpose of settlement; and the possession of the seller indicating his assent to become purchaser of the title on the terms held out, has been under, instead of being adverse to the commonwealth. Hence it might seem, from a cursory view of *Morris* v. *Thomas*, 5 *Binn.* 77, and *M'Coy* v. *Dickinson College*, 4 *Serg. & Rawle* 302, that those cases were thus determined, not because there was no statute to bar the commonwealth, but because there was no adverse possession. But in *Bagley* v. *Wallace*, 16 *Serg. & Rawle* 245, the maxim was applied to lands on which the entry of the defendant was an unequivocal trespass, and the exemption of the commonwealth put expressly on the ground of her prerogative as a sovereign. And the same principle seems to have been held in *The Commonwealth* v. *M'Donald*, 16 *Serg. & Rawle* 400, where it was determined that the adverse possession of part of a street, for twenty years, which, in analogy to the statute of limitations, bars the franchise of an individual, did not bar the public right of way, and, undoubtedly, because there is no statute to bar the public in any case, from which an analogy could be drawn. Without, then, pretending to fix its limits, in all cases, it may be safely asserted that this prerogative is a principle of our government, and a part of the law of the land.

As to the remaining points, it is not to be doubted that, though this suit is in the name of the treasurer, the commonwealth is the actual party, and entitled to insist on her prerogative. The treasurer

is but a trustee to her use: and the nature of the judgment in her favour presents a question of no greater difficulty. It was for a sum certain, in the first instance, and consequently final. This feature was wanting in the *Philadelphia Bank* v. *Craft*, 16 *Serg. & Rawle* 347, in which the judgment was rendered not even for a nominal sum. The law of the subject is satisfactorily stated in *Lewis* v. *Smith*, 2 *Serg. & Rawle* 155, where it was determined, that if on a confession of judgment, the demand is in the nature of a debt which may be ascertained by calculation, it is sufficient to enter judgment generally, which, in contemplation of law, is for the amount laid. Here the action being in debt at the common law, was for a specific sum; and even if a declaration were not filed, the judgment would be rendered certain by relation to the writ. Were it otherwise, every judgment by default, in an action of debt for a penalty which is never the real debt, would be treated as interlocutory; yet, I believe it has never been doubted, that such a judgment binds the lands of the debtor, even though it were a part of the terms that all payments made were to be allowed by the prothonotary.

Rogers, J. and Ross, J. took no part in the judgment, being stockholders in the bank.

The plaintiff had leave to take the amount of the judgment out of court.

Oliphant *against* Ferren.

Copies of entries in the books of the land office, duly certified by the secretary, are competent evidence to prove the real owner of a warrant.

ERROR to *Fayette* county.

This was an action of ejectment by *John Oliphant* against *William Ferren*, to recover four hundred and six and a half acres of land. The plaintiff, after he had given in evidence a warrant of the 5th April 1792 to *David Dunbar*, and a survey thereon, offered in evidence the following paper, signed by the secretary of the land office, and certified under the seal of the office.

"1792, April 21. ——— 9319.

"J. Nicholson, Esq. 7 warrants, amount 2600 acres, at 50*s.* per acre, £65.

"By sundry balances and interest on two tracts of land of 400 acres each, granted by warrant dated 7th September 1789, to Clement Bidwell and George Truder, said land found not vacant, £92. 7*s.* Certificate delivered to Mr Bidwell for J. N., May 2, 1799, fees 70*s.* um. pd.

[Oliphant v. Ferren.]

"In testimony that the above is a true copy of an entry in a book marked No. 4, old purchase blotter from the 1st of February 1792 to 31st December 1793, remaining in the office of the secretary of the land office, I have hereunto set my hand, and caused the seal of said office to be affixed this 21st day of May 1830."

Several other papers of the same character were offered at the same time, all of which were objected to by the defendant and rejected by the court; which was the subject of the only bill of exceptions argued here.

The opinion of the Court was delivered by

Huston, J.—The only error assigned is contained in a bill of exceptions to testimony. That testimony was certain certificates from the office of the secretary of the land office. To understand the evidence we must recur to certain acts of assembly. The act of 29th March 1792 recites in the preamble, that sundry persons, since 1st July 1784, had purchased warrants for lands and paid for them, and for reasons there specified could not procure the land or some part of it; and section one provides, that in such case the owner of the warrant shall apply to the deputy surveyor of the district in which the lands lie, who shall certify to the surveyor-general whether any, and how much of the land described in said warrant can not be surveyed, for the reason aforesaid, or being surveyed, interferes with prior rights, &c.; and the surveyor-general shall certify to the receiver-general how much of said warrant shall remain unsatisfied.

Section 2. Whenever it shall, by the original receipts or other legal voucher, *or by the entries made in his books,* appear to the receiver-general that any person or persons have paid into the land office any money or certificate, for lands granted to them by warrants issued after the 1st of April 1784, and which they have not obtained, or that they have paid any money over and above what was due to the commonwealth for the lands obtained by virtue of said warrants, he shall carry the said money or balance to the credit of such person or persons, his heirs, &c. in payments already due or hereafter to become due to the commonwealth for the purchase of any land within the same, &c.

This act was to expire on the 1st of January 1795. *John Keble* was chief clerk in the office of the receiver-general from the 1st of April 1784 till after 1795. This man kept a series of blotters, or books of original entries of all moneys paid into the receiver-general's office, which are numbered 1, 2, 3, 4, &c. in which the time of payment, and the person who paid, or obtained any credit in that office, and the purpose to which the money paid or the credit was applied, are all entered. In the warrant book generally, the warrant is charged to the warrantee or person in whose name any warrant issued, but in the blotter is found the name of the person or company who actually paid into the office the sums of money on which any

warrant or list of warrants was obtained. Somehow it happened that these blotters were not considered office books, and copies from them, under seal, were not considered evidence. On the 21st of March 1823 an act of assembly was passed, enacting, that "all copies of records, documents and papers in the offices of the secretary of the commonwealth, secretary of the land office, surveyor-general, auditor-general and state-treasurer, when duly certified by the officers of said offices respectively, shall be received in evidence in the several courts of this commonwealth, in all cases where the original records, documents and papers would be admitted in evidence; provided, however, that in any judicial controversy, before any court of this commonwealth, either party have the original record or document produced on the service of proper process for that purpose."

It must be recollected that the office of receiver-general had been abolished, and all papers, records, &c. of that office, by law, were transferred to the secretary of the land office. Before this act, the possession of the original receipt for the purchase-money, or the testimony of *J. Keble* in his lifetime, or proof of his hand writing and entry in these books, was evidence. This act, it is notorious, had an especial reference to these books, and since its enactment such copies are evidence; not conclusive, but an evidence of who paid the money on any warrant or list of warrants. Most of the warrants which issued from 1784 till 22d September 1794, issued in the names of persons who had no interest in them, and often in fictitious names. The real owner procured conveyances from the warrantee when he was going to patent or sell; but many have never been sold or patented, and many owners of warrants and land became insolvent or are dead. Attempts to prove ownership of warrants surveyed and returned, but not claimed by any person, have occurred in cases fair and honest, and in cases not of that description; proof of who actually paid for a warrant, is among the most unequivocal evidence of ownership, though not always conclusive. The dates appear wrong, but are easily understood when we know the practice of the land office. The last part of the document, and the last of the applications for warrants is dated 5th of April, and filed on that day in the office of the secretary of the land office. Although it gave no right until the purchase-money was paid to the receiver-general, yet the practice was (I don't say it was a good one) to give the warrant when it issued the date of the application, although it actually issued some weeks or months after the date of the application, and the title to the land has turned on the proof of this fact. The paper offered was evidence.

Judgment reversed, and *venire de novo* awarded.

Longstreth and Cook *against* Gray.

In an action upon a bond conditioned for the payment of several sums at different periods, in which breaches had not been assigned, no defence having been made, a judgment was rendered pursuant to a rule of court; upon which the plaintiff took out execution, as well for the instalments due at the time suit was brought, as for those not then due, but which had become due afterwards. *Held*, that such execution was erroneous, and that the plaintiff was not entitled to execution for the sums which became due after suit brought, without being put to a *scire facias*.

PURSUANT to a rule of the circuit court, the plaintiffs, having signed judgment for want of an affidavit of defence, for the penalty of a bond, with condition to pay 1302 dollars and 82 cents, on the 22d of January 1831, as well as the like sum for three successive years, but without having assigned breaches, had issued an execution, not only for the instalment due at the impetration of the writ, but for another grown due before the judgment. This execution had been set aside by the chief justice at a circuit court for Alleghany county, immediately preceding the present term, with leave to take out execution for the instalment due at the commencement of the action; and the plaintiffs now moved for leave to take out execution for the second instalment also, without being put to a *scire facias*.

W. W. Fetterman, for the motion.
Foster, contra.

The opinion of the Court was delivered by

Gibson, C. J.—Ever since the decision in *Collins* v. *Collins*, 2 *Burr.* 820, it has been considered as settled, that the stat. 8 and 9, *W.* 3, *c.* 11, extends to bonds payable by instalments; and this construction is consistent not only with the letter of the statute, but with the nature of the remedy provided by it, which was to secure the benefit of successive defences against particular instalments subsequently falling due, instead of subjecting the obligor to the entire penalty, on failure to pay a part of the debt secured by it. In the case at bar, an opportunity to plead whatever might be a defence to the subsequent instalment, was not afforded; nor could the defendant have had it by filing an affidavit, and compelling the plaintiffs to assign their breaches; for nothing could be assigned that was not a breach at the impetration of the writ—as for instance, the non payment of money that was not then demandable. It is true, that at the common law, the penalty was the substantive, as it was the formal cause of action, and the whole of it became demandable as an entire duty, by the most inconsiderable violation of the obligor's engagement; the consequence of which was, that he was driven into

another court to seek relief against the most glaring injustice; but the relief provided by the statute, was adapted to the nature of the greivance, by making each instalment a substantive cause of action. As the penalty was forfeited by a single breach, the plaintiff, in order to escape the consequences of duplicity, had been compelled to select a single default where there were more than one; and it was to reconcile the remedy for this inconvenience to the common law form of the judgment, as well as to protect the obligor from payment of more than should be actually due, that the penalty was still treated as an entire duty in contemplation of law, but in reality, as a security for what were substantially separate and distinct debts, though created by the same instrument. The *scire facias*, therefore, is as much the originating process in respect of instalments not demandable at the inception of the suit, as would be an original writ, were they secured by separate penalties; and it seems to be conceded, that it would be indispensable here, were it not for a contrary practice supposed to have prevailed since the decision in *Sparks* v. *Garrigues*, 1 *Binn.* 152, and to have acquired a force superior to that of the statute, which having been extended to this country only by practice, can claim, it is said, no more respect than is due to any other law that is founded in domestic usage. It would not, I presume, be contended that a statute extended to this country by express provision, obtains not by force of the legislative power; or that standing unrepealed by our own legislature, it is less obligatory here than an act of assembly passed before the declaration of our independence: and why a statute extended by practice, should not also have the force of a legislative act, I am unable to understand. The fact of submission to its dictates, operates but as evidence of the legislative will, admitted by the acquiescence of the people; but the question of extension once settled, the statute, or so much of it as has been adopted, operates by its inherent power. It is for this reason that we have held ourselves bound by the statutes of the mother country as firmly as by our own. But the matter does not rest on conclusions to be drawn from general principles. By the act of the 28th of January 1777, it was declared that acts of assembly in force on the 14th of May preceding, should be in force from the 10th of February ensuing, "as fully and effectually, to all intents and purposes, as if the said laws and each of them, had been made or enacted by this general assembly; and the common law, AND SO MUCH OF THE STATUTE LAWS OF ENGLAND AS HAVE HERETOFORE BEEN IN FORCE IN THE SAID PROVINCE." If then the statute of *William* be thought to require legislative sanction in order to raise the character of its provisions above the level of prescription, here we have it: and it would therefore seem that these provisions are no more to be repealed by decision, or their construction varied by practice, than if they were re-enacted here in terms. Neither can the convenience and despatch of a summary award of execution add a particle of force to the argument. To dispense with the *scire facias* in respect to a part of the demand, to which the de-

fendant has not had an opportunity to plead, by calling on him to respond instanter to a motion for execution, would be not merely to dispense with the ordinary process of the law, but materially to change the established order of proceeding as regards the trial by jury. The court would doubtless direct an issue if there were ground to suspect the existence of a defence; but the benefit of a trial by jury would be held by no better tenure than the discretion of the judge, instead of being what it really is, a constitutional franchise, demandable of right and in the first instance. It would be equally convenient and conducive to despatch, to make an execution the first process in the case of a bond for a gross sum, whenever no probable ground of defence should appear; yet no one will pretend that an award of execution on motion ought in that case to be substituted for a judgment on a declaration and original writ. To say that the court would be bound to direct an issue *ex debito justiciæ*, is to say nothing. That would make the summary award of execution depend on a previous waiver of the *scire facias;* and no one pretends that there is any thing in the statute to forbid such a waiver. What I object to, is an arbitrary determination of the question of defence by the court *in limine.* But what was in fact the point decided in *Sparks* v. *Garrigues*, and what is the practice to which it is supposed to have given birth? The question had respect to the form of a judgment in an action on a bond for interest, payable annually till the principal should become due; and the difficulty was, how to frame the judgment so as to give further recourse on the bond for future arrears and the principal when demandable. The chief justice furnished a very satisfactory, and it seems to me, a very obvious solution of it, on the usual judgment for the penalty as a security. In fact the difficulty had been disposed of in *Collins* v. *Collins*, already cited, which was essentially the same case, but stronger, inasmuch as there was actually a sum to be defalcated, in which case the statute of set off, there, as here, directs the judgment to be for the residue; and it is not a little remarkable, that a leading case of such importance shculd have been passed without notice by the counsel or the court. But in demonstrating the practicability of applying a general judgment, to the enforcement of future payments, the chief justice inadvertently said, that the plaintiff must move the court for future executions. Whether the course of ulterior proceeding were by motion or by *scire facias*, being no part of the inquiry, was a subject to which his attention was not particularly drawn; and what was said being intended merely to illustrate the position taken in respect to the form of the judgment, was predicated, it is not too much to say, without that attention to extreme accuracy for which he was certainly remarkable in delivering his judgment on the point decided. Had his researches been directed to the subject of the present question, he would have perceived, at once, that *Howell* v. *Hanforth*, 2 *W. Bl. Rep.* 1016, and *Ogilvie* v. *Foley*, 2 *W. Bl. Rep.* 1111, in which the notion of a summary award of execution was first started, had

been overruled, and the suggestion of breaches deemed indispensable, as indeed it appears to be by the letter of the statute itself, which is peremptory. Either, then, *Sparks* v. *Garrigues* was not supposed to be within the purview of the statute, or the chief justice's recollection of the practice was misled by the two apocryphal cases just mentioned; or, what is more probable, by the very practice whose origin has since been attributed to what then fell from him, but which has long prevailed, here and elsewhere, in relation to judgments *on warrants of attorney*. These have never been treated as within the statute,(*a*) because its terms are applicable to none but judgments in actions depending, and rendered on verdict, demurrer, confession, or *nil dicit;* which a judgment on warrant of attorney is not. In the case of such a judgment, the practice has undoubtedly been to award execution on motion, for instalments already liquidated, as they successively become due. I have known many instances of it, without being able to call to recollection a single one in which the same practice was applied to a judgment in an action that had been depending. That there have been exceptions, in the courts of a state, where the practice has been so loose and indeterminate as ours has been for the last twenty years, is altogether probable; but that there has been such a uniformity of procedure as to acquire the force of law, on the principle of *communis error*, or even a title to respect on the score of consistency, is confidently denied. In conclusion, it is believed that both the decision in *Sparks* v. *Garrigues*, and the practice of our courts, as far as it can be ascertained, are entirely consistent with the provisions of the statute, which, in a case like the present, are decisively adverse to a summary award of execution.

The plaintiffs took nothing by their motion.

Rogers, J.—I object to the opinion just delivered, because it overturns a practice of at least twenty-six years; and that without, so far as I can perceive, the least necessity. In *Sparks* v. *Garrigues*, Chief Justice *Tilghman* directed the course to be pursued, on an application similar to the present, in language which it is impossible to mistake. It is, however, said, that the point is not directly decided; and I admit that it is not; but, when a practice has generally obtained, in conformity to a recommendation of the chief justice of this court, implicitly sanctioned by his colleagues, it seems to me it deserves all the respect of a solemn decision. I do not claim the observance of the rule as a *dictum*, but because it has been acted upon by bench and bar, from that time until the present. In *Sparks* v. *Garrigues*, the principal question was, in what manner the judgment should be entered, whether for the penalty or for the interest, for which suit was brought.

(*a*) See *Austerbury* v. *Morgan*, 2 *Taunton* 195; *Cox* v. *Rodbard*, 3 *Taunton* 74, and *Kinnersly* v. *Mussen*, 5 *Taunton* 264.

[Longstreth and Cook v. Gray.]

On that question there was great diversity of opinion; but it was admitted by the whole bench, that, on principle, it was the same as a suit brought on a bond, payable by instalments; and on that ground it was relied that the judgment should be entered for the penalty. In answer to an objection made at the bar, (for the case appears to have been examined with great care) the chief justice indicates the course to be pursued, in collecting the interest that might thereafter become due. It has been also objected, says that excellent man and experienced judge, that on an entry of judgment for the penalty, the defendant will be debarred from the benefit of a defence, founded on circumstances arising after the commencement of the action. But that is not this case. The plaintiff, in the first instance, is only allowed to take out execution for the sum due, when the action was commenced; *he must move the court for future executions;* and then, if it be made appear that the defendant has a defence other than that which has been tried, and arising subsequently to the suit, the court have it in their power to see that justice shall be done. It is extremely convenient, and prevents a multiplicity of suits, to enter judgment for the penalty of a bond, and to give permission to the plaintiff to take out execution for the different sums as they become due, according to the condition.

It is said that the chief justice refers to a judgment confessed on a warrant of attorney. In answer to this I have to remark, that the case has not been so understood; nor can it be, with any appearance of plausibility, so construed. *Sparks* v. *Garrigues* is not a judgment on a warrant of attorney, but is a judgment for the penalty of a bond, rendered on a verdict; and that there is a difference between such a judgment and a judgment by default, passes my comprehension. It was in reference to the case itself in which the opinion was delivered, that the chief justice indicated the course to be pursued, and there can be little doubt, that, if it became necessary, that course was pursued. It is unnecessary to contend that the other members of the court expressly concurred in the reasoning of the chief justice. It is sufficient for my purpose that they did not dissent; and that the practice has been in conformity to it. I have had an opportunity of consulting with some of the members of the bar, who concur with me, that such has been the understanding of the bar and bench, and that the practice has been as there stated since the case in 1 *Binn.* In addition to this, we have the experience of at least one other of the members of the court. Supported, then, by this authority, the plaintiff asks the court to award him an execution, and this we refuse, without special cause, on the ground of some decisions which have been in England, on the stat. of 9 and 11 *William* 3. I would not wish to be understood as denying the authority of that statute in Pennsylvania; it has been adopted by our courts in practice; and the same tribunal which gave it validity, has also given it a construction, and on this the plaintiff relies. It will be conceded that if such practice exists, it would be unwise to disregard it, except

from necessity. To use the strong language of the present chief justice, in *Bety's appeal*, with a little variation, nothing but the presence of an overwhelming mischief should lead us to disregard settled constructions, or uniform practice. That there is a necessity for a change remains yet to be proved. A plaintiff applies to the court for leave to take out execution, and this is granted, unless notice, which is always required, be given the defendant, and he shows a defence other than that which has been tried, and arising subsequent to the suit. If the defendant has a defence, the court simply refuses to interfere, and the plaintiff must sue out a *scire facias*, or suggest breaches on the rule, in conformity to the statute. It is said by Chief Justice *Tilghman*, that this is a convenient practice, and that it prevents a multiplicity of suits. But that is not its only recommendation. I speak of Pennsylvania, not of England. It is a safe, speedy, and cheap practice. Why should a plaintiff be put to a *scire facias*, when there is no defence? In England, the answer is obvious, where costs are almost considered as a vested right. But not so, and I hope it never will be so, in Pennsylvania. The only effect will be to increase costs, and incur delay, and that for no other purpose, that I can perceive, than to assimilate our practice to the decisions which have been made in England, under the statutes of 8 and 9 *William*. No complaint has yet been made of the operation of the rule, and why change it? Independent of the construction which has been given to the statute of *William*, it will be difficult to give a reason, none has been attempted, why a different course should be pursued, on a judgment by a default, and on a verdict on a judgment confessed. The trial by jury is secured to the party in the one case, as much as the other. If he has a defence to the original action, he should suffer judgment by default. If his defence arises afterwards, he is also equally sure of a trial by jury; for, it must be recollected, that the court will not grant leave to take out execution, except the plaintiff gives the defendant notice of his intended application, and this for the purpose of giving the defendant an opportunity to show that he has a defence against the plaintiff's demand.

Commonwealth ex rel. Davis *against* Lecky.

The supreme court will not discharge a prisoner from a commitment upon a *capias ad satisfaciendum* issued out of the court of common pleas.

THE relater, *Thomas B. Davis*, being brought before the court on *habeas corpus*, objected to the legality of his arrest on a *capias ad satisfaciendum*, returned for the cause of his detention, that it was made after the execution had been superseded by a writ of error. The respondent, who was the sheriff of Alleghany county, testified that Mr *Davis* came into his office, and that the execution was put into his hands in order to know what arrangement he intended to make in respect to it, but without touching his person with a view to a formal arrest; on which he went away, but shortly returned and gave notice that a writ of error had been taken and bail given; notwithstanding which he was taken into custody. On hearing this, the court suggested a doubt whether the *habeas corpus* were the proper remedy, taking for granted, what was by no means clear, that the execution of the process was irregular; and desired the matter to be spoken to.

Watts, for the relater.

The habeas corpus act of 1785 extends to commitments on civil process. In *Hecker* v. *Jarrett*, 3 *Binn.* 404, it was admitted that a judge in vacation may discharge from an arrest on civil process; though it must be conceded, the cause was ultimately decided on the ground that the discharge was void for want of notice to the other party. If a single judge may discharge, why may not the supreme tribunal of the state? In the *Commonwealth* v. *Hambright*, 4 *Serg. & Rawle* 149, it was determined that where the court which issues the process has refused to discharge on a claim of privilege, the supreme court is not bound to interfere; but there was no intimation of a difficulty on the ground that the prisoner was in custody on the process of another court. On the contrary, interference was declined expressly because the common pleas had already determined the right. *Respublica* v. *Goaler*, 2 *Yeates* 349, was the case of an arrest on mesne process; and to be sure the court from which it issued was the proper one to say whether the defendant should be delivered on common bail. That is a very different case; and so is that of the *Commonwealth* v. *Hambright*, which depended on the discretion of the court, and in that respect resembled *Ex parte Lawrence*, 5 *Binn.* 304, in which it was decided that the court is not *bound* to grant a *habeas corpus* where the matter has been already heard on

the same evidence by another court. But the *habeas corpus* is a great constitutional remedy; and unless it be held to extend to every case of illegal confinement, without regard to the character of the process, it will not have the enlarged and beneficial operation which the legislature, as well as the framers of the constitution intended.

Fetterman, for the respondent, was stopped by the court.

The opinion of the Court was delivered by

GIBSON, C. J.—The *habeas corpus* is undoubtedly an immediate remedy for every illegal imprisonment. But no imprisonment is illegal where the process is a justification of the officer; and process, whether by writ or warrant, is legal wherever it is not defective in the frame of it, and has issued in the ordinary course of justice from a court or magistrate having jurisdiction of the subject matter, though there have been error or irregularity in the proceedings previous to the issuing of it. *Mackalley's Case*, 9 *Co.* 68 *a*; 1 *Hale's P. C.* 488. In *Cable* v. *Cooper*, 16 *Johns.* 155, it was accurately said by the judge who delivered the opinion of the court, that whether the judgment or execution be voidable, is a point which the sheriff is never permitted to raise; and that having arrested the party, he is bound to keep him till he is discharged by due course of law. To the same effect is *Cameron* v. *Lightfoot*, 2 *Bl. Rep.* 1190, and 2 *Saund.* 101 *y*, note 2, where the authorities are collected. If, then, the officer can not allege error in the process, how can the prisoner do so consistently with the common law principle, that the proceedings of a court of competent jurisdiction are not to be reversed or set aside by a collateral proceeding, where redress may be had by appeal, writ of error, or any other direct means of review? That this principle is applicable in all its force to the *habeas corpus*, is sustained by an abundance of authority. In *Barnes's Case*, 2 *Roll. Rep.* 157, a return that the prisoner had been committed in execution by the court of admiralty to the warden of the cinque ports till he should restore an anchor carried away by him, or pay the warden forty pounds, was held sufficient, though the proceedings were irregular. So in *Bethel's Case*, 1 *Salk.* 348, it was held that if a commitment in execution be wrong in form only, the defendant may be discharged on *habeas corpus*, but is to be put to his writ of error. *S. C.* 5 *Mod.* 19. And *The King* v. *Elwell*, 2 *Stra.* 79, is a still more signal instance. On motion to discharge the prisoner on exceptions to the commitment, which was a conviction of forcible entry and detainer, the king's bench refused to enter into any consideration of them till the commitment were regularly before them; and the proceedings having been removed by *certiorari* into that court at a subsequent term, were first quashed, and the prisoner, who had been bailed in the mean time, was then discharged.(*a*) The same principle seems to

(*a*) See also *Ex parte Gill*, 7 *East* 376, where, on a *habeas corpus* for an apprentice committed to the house of correction on a conviction by two magistrates, the court

[Commonwealth ex rel. Davis v. Lecky.]

have been recognized by our own court in *Respublica* v. *Goaler*, 2 *Yeates* 349, where it was determined that the supreme court can not discharge a party arrested on process from the common pleas; and in the *Commonwealth* v. *Hambright*, 4 *Serg. & Rawle* 149, we refused to consider objections to an arrest upon similar process, urged on the ground of privilege. It must be admitted that the reasons on which the court proceeded in these two cases are not very fully unfolded; but the decisions are entirely consistent with the rule as I have stated it, and I know of none else on which they can be sustained. They may, I presume, be considered as in point; for that the arrest was on mesne instead of final process, can scarce be thought a material difference. *Hecker* v. *Jarrett*, 3 *Binn.* 409, which is supposed to bear the other way, was distinctly decided on another ground; and though the power to discharge from an execution seems to have been recognized by the chief justice, there is no reason to think he had in view an execution merely voidable. Of the power to discharge from a void execution no one ever doubted; and his remark is in fairness applicable to no other. There are, I believe, few decisions on the point in our sister states. In New York it seems to be doubted whether their *habeas corpus* act extends to arrests on civil process; and their judges have for that reason, as well as on general principles, refused to discharge in some instances on exceptions to its regularity; as in *Cable* v. *Cooper* already cited. But in the *Bank of the United States* v. *Jenkins*, 18 *Johns.* 308, though it was held that the *habeas corpus* act did not extend to the supreme court in term time, yet no doubt was entertained of the common law power of the court to relieve from all illegal imprisonments, whether in civil or in criminal cases; and it was expressly determined that a *habeas corpus* is not the remedy for a defendant imprisoned on a *capias ad satisfaciendum* which has issued irregularly, the proper course being an application to the court from which it has issued. After this explicit recognition of the principle in a case exactly like the one before us, it is scarce necessary to refer to *Yates's Case*, 4 *Johns.* 318, in which it was determined that the supreme court of that state can not discharge from a commitment by the chancellor for a contempt. Any other rule would present some very curious judicial phenomena. By an inversion of their functions, a single judge in vacation, and of perhaps an inferior court, would be legally competent to rejudge the judgments of the highest tribunal in the land; and the supreme court of the state, instead of proceeding systematically in the correction of errors, would be called upon to produce its results by a new and shorter process, while in the guise of writs of *habeas corpus*, it would be flooded with appeals from the decisions of the other courts on questions of bail. The rule is therefore absolutely necessary to prevent judicial proceedings from running into a state of incurable disorder; and an application of it to the relater's case, is fatal to his

refused to consider circumstances laid before them by *affidavit*, which might have been made matter of defence before the magistrates.

[Commonwealth ex rel. Davis v. Lecky.]

claim to relief in this particular way. Every court is the proper tribunal to judge of the regularity or abuse of its process; and the remedy for the alleged irregularity here, is an application to the court from which the process issued.

The relater was remanded.

Snively *against* Luce.

An unexecuted parol partition is void; and it is still parol when made by the intervention of agents acting by virtue of a parol authority, though their act be evinced by a writing under seal.

ERROR to the common pleas of *Butler* county.

This was an action of ejectment brought by *Henry Snively* against *Stephen Luce*, for a tract of land in *Butler county;* upon the trial of which the defendant, in order to maintain the issue on his part, offered in evidence certain depositions to prove, that *John, Samuel, David,* and *Robert Cunningham*, heirs at law of *James Cunningham* deceased, having been tenants in common of certain lands, including that in dispute, had, by parol, appointed four individuals to make a division and partition of the said lands between them; that the persons thus appointed went upon the ground, and made the partition, and awarded to each of the said tenants in common, a particular part; and to accompany this, proof with the award, in writing, signed by the men, acknowledged before a justice of the peace, and recorded. It did not appear that separate possession was taken, in pursuance of the partition. To this evidence the plaintiff objected, upon the ground that a partition made by parol authority was void. The court below overruled the objection, and admitted the evidence; to which exception was taken, and the same question was here argued by

W. W. Fetterman, for plaintiff in error.
Gilmore, for defendant in error.

Per Curiam.—An unexecuted parol partition is void; and it is still parol when made by the intervention of agents, pursuant to a parol authority, though their act be evinced by a writing under seal. That can give it no additional authority; and the whole being irrelevant, and void, ought not to have gone to the jury.

Judgment reversed, and a *venire de novo* awarded.

Campbell *against* Galbreath.

In order to establish the ownership of a warrant in the name of another, it is competent for a plaintiff, in ejectment, to prove that they under whom he claims, took it out of the office; put it into the hands of the deputy surveyor; employed chain carriers, &c.; procured the survey to be made, and paid the expense thereof: without first proving that they had paid the purchase money for the warrant.

A plaintiff having thus established the ownership of a warrant to be in three individuals, who were partners, it is competent for him to give in evidence the declarations of one of them, made at an early period, that another of the firm was duly authorized to act for himself and his partners, in procuring a settlement of the land to be made: and after this was proved, an agreement, in writing, between such partner, and one who contracted to settle, may be given in evidence: the settlement not having been made by such contracting party, it is competent to give in evidence his declarations, made at the time, that he contracted for his son, who did make the necessary settlement and improvement.

An action of ejectment may be maintained in the name of the warrantee, although he may have no beneficial interest in the land, and may not have known of the institution of the action.

A, having procured a warrant for land "lying north and west of the rivers Ohio and Alleghany, and Conewango creek," in pursuance of the act of 3d April 1792, did not comply with the conditions of that act, in making a settlement within two years; but, after the lapse of that time, he commenced a settlement and improvement. B, immediately after, also commenced a settlement and improvement upon the same land, which he continued, and subsequently obtained a vacating warrant from the commonwealth, reciting the fact that A had not complied with the terms of the act In an action of ejectment between parties holding these conflicting titles, it was held, that A's previous settlement, although not within the two years, gave him the better title: and the fact of his settlement not having been persevered in, was sufficiently accounted for by the interruption and threats of B.

WRIT of error to the common pleas of *Mercer* county.

This was an action of ejectment by *Josiah Galbreath* against *Thomas Campbell*, for four hundred acres of land, lying north and west of the river Alleghany and Conewango creek.

The plaintiff gave in evidence a warrant to *Josiah Galbreath*, for four hundred acres, dated 31st March 1794, and a survey in pursuance thereof, made 26th October 1795, embracing the land in dispute: that an improvement and residence were made on the land by *George W. Fell*, as early as the spring of 1798, but which were commenced more than two years after the 22d December 1795, when the hostility of the Indians ceased to prevent settlement. The plaintiff then offered to prove, that the warrant in the name of *Josiah Galbreath*, was taken out by *Walker*, *Probst* and *Lodge*, who put it into the hands of the surveyor, employed the chain carriers, and paid all the expenses of making the survey. The defendant objected to this evidence, and the objection was overruled and exception taken. The plaintiff then offered to prove the declarations of *Lodge*, made in 1797, and often after, that *John Walker* was a partner of his and *Probst* in this and other lands, and was the agent

of the firm of *Walker, Probst* and *Lodge*, with authority to make contracts for the settlement and sale of the land. This evidence was also objected to by the defendant; the objection was overruled, and exception taken. The plaintiff then offered in evidence an article of agreement between *John Walker* and *William Fell*, by which the title of *Walker, Probst* and *Lodge* was vested in the said *William Fell;* this evidence was also objected to; the objection was overruled, and exception taken by the defendant. The plaintiff then further offered to prove the declarations of *William Fell* and *George W. Fell*, made at the time, that the settlement and improvement made by *George W. Fell*, was under his father, and in pursuance of the agreement with *Walker*. This evidence was also objected to by the defendant, and the objection was overruled, and exception taken.

The defendant then proved that a settlement and improvement were made on another part of the land in dispute, in 1798 or 1799, but after the improvement of *George W. Fell* had commenced, by *Alexander Hamilton*, who sold his right to *Thomas Campbell*, the defendant, in the fall of 1799 or spring of 1800. *Campbell* took possession of the land, and continued the settlement and improvement. On the 26th January 1805, *Campbell* procured a *vacating warrant* to himself, for four hundred acres of land, interest from 1st April 1798, reciting the warrant to *Josiah Galbreath*, and vacating it for default of settlement; a survey was made in pursuance thereof of three hundred and eighty-four acres on the 8th March 1805, and a patent issued on the 26th August 1806, to *Thomas Campbell*. The defendant then gave evidence to prove, that no improvement or settlement of the land had ever been made by *Josiah Galbreath*. The defendant now called upon the plaintiff's counsel to say for whose use this suit was brought. Mr *Banks* replied, that he appeared for *George W. Fell;* Mr *Bredin* replied that he appeared for the heirs of *Lodge;* and Mr *Foster*, who was also counsel for the plaintiff, declined to make any reply. The defendant's counsel then proposed to examine Mr *Foster*, for the purpose of showing, that no one was employed by *Josiah Galbreath* to bring the suit, and that such a person was not known to them. The plaintiffs objected to this evidence, and the objection was sustained for the following reason, assigned by the court. "The evidence is immaterial, inasmuch as the counsel, throughout the trial, have said, that the suit is in the name of *Josiah Galbreath*, the warrantee, whom they consider as the trustee for those who have the real interest." To this opinion exception was taken by the defendant.

Some proof was then given by the plaintiff of angry threats made by *Hamilton* to *Fell*, in 1799; what he would to him, if he caught him on the land in dispute. The plaintiff requested the court to charge the jury on the following points:

1. That the entry made by *Thomas Campbell*, and those under whom he claims, into the land granted by warrant, and surveyed to

the plaintiff, was tortious, and not rightful, and that he can derive no benefit from this tortious act.

2. That a vacating warrant, afterwards granted to *Thomas Campbell*, for this land, does not, by relation, make his entry rightful.

3. That the entry and settlement of *Thomas Campbell*, and those under whom he claims, on the land surveyed to the plaintiffs in pursuance of his warrant, excuse any settlement on the part of said plaintiff, and do operate and inure to his use, as if made by himself, or those claiming under him.

4. That *Alexander Hamilton*, (if the jury believe the evidence) having prevented those claiming under the plaintiff, by threats of violence, from making and continuing a settlement on the land, neither he, nor those claiming under him, can take advantage of the want of settlement.

And the defendant requested the court to charge the jury,

1. That in order to make the title of the plaintiff good, it was necessary for him to make, or cause a settlement to be made on the land, within two years after the pacification with the Indians, 22d December 1795.

2. That in default of such settlement, the state had a right to issue a vacating warrant to another actual settler.

3. That if the jury believe that *George W. Fell* entered on the land, for the purpose of making an actual settlement for the use of the warrant holders, after the entry of another adverse settler, yet if he did not remain for the time, and clear the quantity of land required by law, it is such a settlement as could be abandoned; and if he did not pursue his settlement with reasonable diligence, the party under whom the defendant claims in this case had a right to hold possession, complete his settlement, and take out a vacating warrant.

4. That the testimony of *Benjamin Stokeley* does not show the interest in the warrant to be in *Benjamin Lodge;* and that any contract made by him, or any one under his authority, does not show and establish a contract under the warrant, and that a settlement made under such a contract, is not made under *Josiah Galbreath*, but adverse to him, and will not affect the right of the vacating warrant.

5. That if the jury believe that *Josiah Galbreath* never paid the purchase money for the warrant, never received it from the land office, or had it in possession, or exercised any acts of ownership over it, he is not such an owner or trustee as can support an ejectment, and has not, and never had, any right either legal or equitable to the land.

6. That if the jury believe that *Josiah Galbreath* is a mere fictitious person, this ejectment cannot be supported in his name.

7. That if the jury believe that the settler entered and commenced his settlement with the view and intent to follow up his entry, by obtaining a vacating warrant, the warrant afterwards issued confirmed his original entry, and made it legal and valid.

[Campbell v. Galbreath.]

Shippen, President, was of opinion that the evidence contained in the several bills of exception should have been rejected, but the same having been received, except the last, by the associates, he was of opinion the plaintiff was entitled to recover, and so instructed the jury, who found a verdict accordingly. To which opinion exception was taken by the defendant.

The opinions of the court, admitting and rejecting the evidence contained in the several bills of exception, and in the answers to the several points of the plaintiff and defendant, were assigned for errors, and argued by

Pearson and *Ayres*, for plaintiff in error.
J. Banks, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The first error assigned, is an exception to the opinion of the court below, in admitting the counsel for the defendant in error, who was the plaintiff below, "to prove, that *Walker, Lodge* and *Probst* took out the warrant given in evidence by the defendant in error, with other warrants, put them into the hands of the deputy surveyor, procured the surveys to be made, and paid the deputy surveyor, employed chain carriers, blasers, &c., and paid them." This evidence was offered to show that *Walker, Lodge* and *Probst* were the owners of the warrant, and to rebut the presumption of law, that every warrant granted for land belongs to the warrantee therein named. I think that the evidence was admissible for this purpose. It is objected, that inasmuch as it was a warrant, and not a location, that the purchase money must have been paid by the party taking it out of the land office, and that therefore the offer ought to have been accompanied with proof of their having paid the purchase money on the warrant, otherwise the proof offered was still deficient. This objection appears to be rather critical; for the offer in its terms was, "to prove that *Walker, Lodge* and *Probst took out the warrant.*" Now if this could not be done without their paying the purchase-money for the land, does not the offer necessarily imply the offer of proof, among other things, that they had paid, &c.? But if it were not so implied, the evidence was still admissible; and in the absence of all rebutting circumstances, might be sufficient to satisfy the jury that *Walker, Lodge* and *Probst* were the owners of the warrant. *Evans* v. *Nargong*, 2 *Binn.* 55; *Cox* v. *Grant*, 1 *Yeates* 166; *Taylor* v. *Ewing*, 2 *Yeates* 119. In *Cox* v. *Grant* the court speak of *applications* and *warrants* indiscriminately, and make no distinction as to the nature of the proof that is required or admissible to prove the ownership thereof to be in a person different from the locatee or warrantee named in the application or warrant.

Superintending the survey or paying the fees, has generally been deemed sufficient evidence of ownership of an application, unless rebutted by evidence that the person so superintending or paying acted

as agent; or unless possession or some act of ownership appeared in favour of the person in whose name the application was entered. *Cluggage* v. *Duncan*, 1 *Serg. & Rawle* 117. Now, since in practice, as well as in the nature of the transaction itself, the same acts are as strongly indicative of ownership in the case of a warrant as in that of a location, it appears to me that the court was right in overruling the objection. Even the payment of the purchase money into the treasury of the state, is far from being conclusive evidence that the person by whose hand it was paid is the owner of the warrant; for the money may have been furnished to him by another, for whose use he undertook to pay it in. Although, from the late practice of the land office, in keeping an account of the names of the persons respectively by whom the moneys are paid for land warrants, it may be that in most cases it would appear from their books by whom it was paid or handed into the office; yet I have no doubt but that there are many cases in which it does not appear; and to establish the rule contended for by the plaintiff in error, would compel the party, as often as that should happen, to be at the expense and trouble of getting some one from the land office to attend on the trial as a witness, to prove that it did not appear upon the books or accounts kept in the land office from whose hand the purchase money for the warrant had been received; or otherwise to have his deposition taken under a rule of court for that purpose, which I think has never been required, nor yet introduced into practice. I say it would impose this burthen upon the party; because a certificate from the officer in whose care such books were to that effect, being merely of a negative character, would not, as I conceive, be admissible in evidence. Besides, such an entry in the books, even if it existed, would only be presumptive evidence at best, and corroborating or rebutting, just as it might happen to show that the purchase-money was paid by the party claiming to be the owner of the warrant, or to have been paid by some other. If it showed the former, it would be corroborating, when preceded by evidence of the same party having superintended and directed the surveying of the land, and of his having paid the fees and expenses of the same; but if it showed the latter, it would then be rebutting testimony, and might be produced by either party, accordingly as he thought it would answer his purpose; for being a public registry, it is alike accessible to either party. I believe it has been customary at the land office, upon the payment of the purchase money for land warrants, or taking them out, to get receipts by the persons paying; and why not require this evidence, or the oath of the party that he never obtained such receipt, or if he did, that it was either lost or destroyed, instead of requiring a certificate from the officer having in charge the books of the land office, as a receipt would not only show the name of the person by whom the money was paid, which is the most that a certified copy from the books would do in any case, but the production of such receipt by the party would be, in addition, evidence of his identity?

[Campbell v. Galbreath.]

The second error is an exception to the opinion of the court below, in permitting the plaintiff there to prove by *Andrew Christy*, that he heard *Benjamin Lodge*, who was claimed to have been a part owner of the warrant say, that "whatever *John Walker* (who was also claimed to be a part owner of the warrant) did or would do, he (*Lodge*) would be bound by; and that *Walker* was a partner with himself and *Probst* in the land; that he (witness) heard *Lodge* say this in 1797 and frequently since, as late as 1800, both before and after the article with *William Fell*."

As evidence had been given that the deputy surveyor was employed by *Lodge* to make the survey, and it had been made upon his credit, and that he had actually paid sixty dollars towards the surveying fees of this and other lands, it seems to me that these declarations of *Lodge* were admissible and properly received, at least for the purpose of proving the authority under which *Walker* acted in making the agreement with *William Fell* to settle on and improve the land in dispute. In this point of view it cannot be said to have been admitted in contravention of the statute against frauds and perjuries, as has been contended by the counsel for the plaintiff in error; because it is not to be considered as evidence of a transfer of any right or interest in the land, but of an authority to settle and improve, as required by the act of 1792, and to make those acts, when done, the acts of *Benjamin Lodge* himself, according to the maxim of law, *qui facit per alium facit per se*. There is certainly nothing in this statute which forbade *Lodge* from hiring a man by parol for a certain sum of money, or from employing another by parol to have it done by any one for him, that is, to go on and build a dwelling house upon the land, take possession of it with a family, make it the place of their abode, clearing and fencing the requisite quantity of land, and residing thereon for the space of five years; in short, to do every thing required by the act of assembly of the 3d of April 1792. It can not be doubted, I apprehend, but that a settlement, improvement and residence obtained upon the land in this way would be a compliance with the terms of the act, and would entitle the warrantee to hold the land absolutely in fee simple. The contract would be executory and binding; for our statute against frauds does not annul or make void any contract that is otherwise lawful; and a personal action may be maintained for the breach of it. *Bell* v. *Anderson*, 4 *Dall.* 152; *Ewing* v. *Tees*, 1 *Binn.* 450.

The third error, which is an exception to the opinion of the court below, under which the agreement made with *William Fell*, by *Walker*, was admitted to be given in evidence, has been already answered; and that the opinion of the court below, in this behalf, was right, has been shown in the answer just given to the second error.

The fourth error, which is an exception to the opinion of the court in admitting the declarations or admissions of *William Fell* in evidence, to show that it was for his son *George W. Fell* that he con-

tracted with *Walker;* or to show, in other words, that he, *William Fell*, under the contract which he had made with *Walker*, had employed his son *George* to make the settlement and improvement upon the land. It appears to me, that it was competent for *William Fell* to do this, without having any writing with *George* on the subject; and that parol evidence of his admissions of the fact of his having made the contract for the benefit of his son *George*, or of his having given the benefit of it to him, so as to connect the acts of *George* upon the land with the right of *Lodge* and others, under the warrant, was properly admitted in evidence, upon the same principle that the evidence noticed in the second bill of exception was received.

The fifth error is, in principle, the same with the second and fourth, and cannot be supported. The court below was right in admitting the testimony.

The sixth error is an exception to the opinion of the court below, in overruling the offer of the counsel for the plaintiff in error, who proposed "to examine *Samuel B. Foster*, Esq., one of the counsel for the defendant in error, for the purpose of showing that they had not been employed by *Josiah Galbreath* to bring this suit; that they never had any communication with him, and never knew any such person." It is difficult to conceive what occasion there was for giving such testimony; or how, if given, it could have availed the plaintiff in error. It was not pretended by the counsel for the plaintiff below that *Josiah Galbreath* was the real plaintiff in the cause; that he had any interest in the land; that they or any of them were employed by him, or knew any such person. Such evidence, had it been given, would not have proved that there was no such person, or that *Josiah Galbreath* was a fictitious name. Beside, it may be doubtful whether evidence to prove that there was no such person in being as *Josiah Galbreath*—the only name as plaintiff below on record, would have been admissible under the general issue, which was the one joined in this case; such evidence would only have tended to abate the suit, and *perhaps* ought, therefore, to have been pleaded, or, at least, a previous notice to have been given of it, in order to prevent surprise. Our action of ejectment is in no respect a fiction now, as it is in England. And although our act of assembly on the subject directs that the plea shall be "not guilty," yet, it may be, that the legislature only intended to direct as to the plea in bar that should be put in to this action, and to leave pleas in abatement as at common law; and the clause of the act which directs that the plea shall be "not guilty," when taken in connexion with the first section of the act, would seem to indicate something of this kind; but as it is unnecessary to decide this question here, I do not wish to be understood as giving a decided opinion upon it. See 1 *Comyn's Dig. tit. Abatement*, E. 16; *Wils.* 302; 19 *Johns.* 308; 1 *Chitty's Pl.* 435, 436.

But if there were such a person in being as *Josiah Galbreath*, I do not see that the defendant below could have derived any advantage

from proving that *Josiah Galbreath* had never employed the counsel, or any of them, to bring this suit; or, in short, that he had never authorized the suit to be brought, and knew nothing about it. If such testimony could have had any bearing upon the cause at all, it would have been rather to support the action; as it would have tended to show that *Josiah Galbreath* was a mere trustee, and that his name, according to an ancient practice at the land office in taking out warrants, had been used by *Lodge*, or whoever took out the warrant in this case. It would, at least, have been perfectly consistent with the claim set up by *Lodge's* heirs to the land; that is, that *Lodge* was owner or part owner of the warrant, and caused the settlement to be commenced upon the land. But if the defendant below had shown that there was such a person as *Josiah Galbreath;* that he was the real owner of the warrant, and no transfer of it appearing to have been made by him to *Lodge*, *Walker* and *Probst*, or any of them: it is manifest, that, for want of even an effort upon the part of *Galbreath* to make a settlement at any time whatever, it would have been difficult to have sustained this action. I, therefore, cannot perceive any good reason why this evidence should have been received, and think the court below was right in rejecting it.

There were four points submitted by the counsel of the plaintiffs below, and seven by the counsel of the defendants, to the court, to be answered. The answers of the court upon these points, together with some things contained in the charge of the court to the jury, have been further assigned for error; but, many of them involve the same question; and all that have any relation to this case may be considered by way of answers to the following questions:

First; Could the jury reasonably infer from the testimony, that *Benjamin Lodge* was owner, or part owner with *Walker* and *Probst*, of the warrant in the name of *Josiah Galbreath?*

Second; If *Josiah Galbreath* never had any interest in, or concern with the warrant, can this action be supported in his name?

Third; If *Josiah Galbreath* be a mere fictitious person, can this ejectment be supported in his name?

Fourth; Could the state have granted a vacating warrant for the land in dispute, after *George W. Fell* commenced his settlement and improvement, if he was the first settler on the land, as long as he continued, and persisted in completing the same, according to law; although he did not commence them until more than two years after the 22d of December 1795, the time when all prevention to making settlement on account of the hostility of the Indians, ceased to exist?

Fifth; And if the state could not, could it grant one to *Thomas Campbell*, the assignee of *Alexander Hamilton*, after *Hamilton* had prevented *George W. Fell* from continuing his settlement and improvement on the land, by taking possession, and holding it, while *George W. Fell* was in possession of it, and after he had manifested his intention to settle and improve the land, under the warrant

granted in the name of *Josiah Galbreath*, by building a cabin, and going into it with his bed and bedding, cooking utensils, and tools for working upon the land, &c. which appears, he being a young, single man, to have been all the property he had?

In answer to the first question, I think, from the acts of *Benjamin Lodge*, in getting a survey made under the warrant, and paying for the same; from his claiming the warrant as his property, in company with *Walker* and *Probst*, afterwards in 1797, before the time had expired within which a settlement was to be made on the land, according to the act of 1792, and the judicial construction put upon it, and causing a contract for the making of such settlement to be entered into with *William Fell*, of all which evidence was given to the jury, together with the lapse of twenty-six years, without any claim to the warrant, save that of *Lodge*, *Walker* and *Probst*, having ever been heard of—that the jury might well, and very rationally infer that they were the owners of it.

As to the second question, I consider that this action may be maintained in the name of *Josiah Galbreath* as a trustee, although he may have known nothing about it. I do not consider his assent to the trust necessary, in order to enable the *cestui que trust* to maintain the action in his name. To decide that it could not be supported without the consent of the trustee, in such a case, would be contrary, as I conceive, to what has been the universal usage and understanding throughout the state on this subject, since the practice first obtained in the land office, which is certainly of old standing, of taking out warrants and locations in the name of other persons, and using their names as trustees without consulting them, and without their consent at any time, either before or afterwards, being given. In England, and in those states where they have courts of equity, it is in the name of the trustee only that the action of ejectment can be maintained. But in this state, for want of a court of equity, it is different. *Ex necessitate rei*, the *cestui que trust* may maintain the action of ejectment in his own name; otherwise he would be without a remedy, at least as against his trustee, where he is in possession of the land, and that possession is in no way necessary for the purpose of executing the trust. In Pennsylvania, the action of ejectment, where it is commenced against any other than the trustee, may be supported either in the name of the trustee, or the *cestui que trust*.

The proposition involved in the third question, does not arise in this case. There was no ground for the jury to presume, that *Josiah Galbreath* was a mere fictitious person. Every warrant granted for land by the commonwealth, is presumed to be granted to and for the use of the warrantee therein named (*Cluggage* v. *Duncan*, 1 *Serg. & Rawle* 117); and of course he must be presumed to be in existence, until the contrary be proved. But proof, that the warrant was granted for the use of one or more, not named in it, does not rebut the presumption, that the warrantee is a real person, and still

in full life; and it does not appear that any other testimony was offered or given, from which the non-existence of *Josiah Galbreath* could reasonably be inferred.

In regard to the fourth question, it may conduce something to a correct solution of it, to examine, first, into the nature of the estate granted by a warrant issued, according to the provisions of the act of the 3d of April 1792, and then refer to the decisions of our courts, which have been heretofore made, together with some acts of the legislature passed subsequently to the act of 1792, on the subject.

The ninth section of the act of the 3d of April 1792, is in the following words: "no warrant or survey to be issued or made in pursuance of this act, for lands lying north and west of the rivers Ohio and Alleghany and Conewango creek, shall vest any title in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made or caused to be made, or shall, within the space of two years next after the date of the same, make or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing or causing a family to reside thereon for the space of five years next following his first settling of the same, *if he or she shall so long live;* and in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue *new* warrants to other *actual settlers* for the *said lands*, or any part thereof, *reciting the original warrants*, and that *actual settlements and residence have not been made in pursuance thereof;* and so often as defaults shall be made for the time, and in the manner aforesaid; which new grant shall be under, and subject to all and every the regulations contained in this act: provided always, that if any *such actual settler* or *grantee*, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands in the same manner as if the actual settlement had been made and continued."

Now, although the language here employed by the legislature, would seem to make the settlement and residence required to be made upon the land, a condition precedent, by declaring no warrant shall vest *any title* unless the condition shall have been performed, if the party should so long live, as the term allowed by the act for the performance of it, and not be prevented from doing so, by force of arms of the enemies of the United States, yet it appears to me that it cannot be considered altogether strictly such. There are no technical words necessary to distinguish conditions precedent from conditions subsequent in their creation: the same expression may indifferently make either, being governable by the intention of the party who frames and effectuates the instrument. 2 *Woodeson* 140;

Ca. temp. Talb. 166. And wherever it appears to be the intent, that the estate shall vest previous to, and until the event which is to defeat it, this is construed to be a condition subsequent. *Ibid.* See also, *Spring* v. *Cæsar*, 1 *Roll. Abr.* 415; *W. Jones* 389. The nature also of the condition which is to be performed may in some degree determine the character of it: as if an estate be granted to a man, *si ipse velit inhabitare*, &c.; it is said that these words are a subsequent condition, because it is a thing of continuance, which may be infringed and broken every year. See *Plowden* 32, note; *Winch* 116; *Vin. Abr. tit. Cond. T. pl.* 33; *Lit. Rep.* 258; *Cro. Eliz.* 360.

Now, the nature of the condition which is to be performed under the act of 1792, makes it indispensably necessary, that the party should have a right to enter upon and possess the land; and this right must be considered as granted to him by the warrant at least. If it be not title, it is a considerable advancement towards what *Sir William Blackstone* defines to be a perfect one (2 *Bl. Com.* 195, 6), and must be considered more than a bare right to the possession of the land; it is nothing short of an incipient and qualified right to it in fee, which is to become absolute and perfect upon the fulfilment of the condition, or happening of those events which dispensed with the performance of it. I think, then, it must be admitted, that, under the warrant, the party has not only a right to enter upon the land for the purpose of performing the condition, but for doing and performing any act of ownership whatever, without being responsible for waste, or liable to be controlled by the state in any thing that he may think proper to do upon it, until after a failure upon his part to perform the condition within the time allowed by the act. So if he be expelled forcibly from his possession, or invaded in it by another person, he has a right to maintain his action of ejectment or trespass against the intruder. Beside, if the warrantee die within the time that is allowed by the act for making the settlement, without having made it, it is clear to me, that, by the terms of the act of 1792, an absolute estate in fee, is thereupon transmitted to his heirs by descent, which could not well be unless he died seised of such.

From these considerations, I am inclined to think that the condition of settlement and residence cannot be considered purely of a precedent character, but that an incipient and qualified right in fee to the land vests immediately in the grantee, upon his obtaining the warrant, liable to be defeated by a non performance of the condition, or to become absolute and unconditional upon the fulfilment of it, or upon the happening of those events which, by the provisions of the act, dispense with the performance of it altogether; and that such an interest being vested in the grantee, he cannot be divested of it, even if he fail to perform the condition, but in the manner prescribed by the act of the 3d of April 1792, or some of the other acts passed in relation to the granting of lands north and west of the rivers Ohio and Alleghany and Conewango creek; and that none other than

the commonwealth can take advantage of the condition broken, unless authorised by some one or more of the acts last alluded to.

It may be proper also to observe and bear in mind, that although the condition of settlement may be considered as forming a part of the consideration for which the land is to be granted, yet the payment of the purchase money would seem to have been the primary and great consideration with the legislature at the time of passing the act of 1792; for in no case is the payment of it to be dispensed with, nor a warrant to be granted until it has been paid. See the last clause of the tenth section. But the death of the warrantee is, by the express provision of the ninth section, sufficient under certain circumstances to dispense with the settlement and residence upon the land. I am aware that a different sentiment was entertained by the late Mr Justice *Yeates*, 4 *Dall.* 204, and therefore have expressed mine with the highest degree of diffidence.

With respect to these lands lying north and west of the rivers Ohio and Alleghany and Conewango creek, it was said, and decided by our courts in *Morris* v. *Neighman*, 2 *Yeates* 450; *Commonwealth* v. *Cox*, 4 *Dall.* 204, 205; *Wilkins* v. *Allenton*, 3 *Yeates* 278; *Jones* v. *Anderson*, 4 *Yeates* 576, and *Skeen* v. *Pearce*, 7 *Serg. & Rawle* 304, that the commonwealth alone could take advantage of the condition broken by the warrantee; and that this was to be done by granting a new warrant, or what has been very commonly called a *vacating* warrant. But the question did not fairly arise in any of these cases, excepting the last; for the settler had entered upon the land within the two years allowed by the act to the warrantee to commence his settlement; and in *Skeen* v. *Pearce* it does not appear whether he took possession of the land within that time or not. It however has been said, and most likely it was so, that it was after the two years had fully expired, and the warrantee had neglected to commence or make a settlement; for the court seems to have decided the abstract question, without regard to the time when the settler obtained possession and commenced his settlement. So far as it has been decided or said by our courts and judges, that no one who enters upon warranted land before the expiration of the time allowed for making the settlement shall acquire any right thereby, or gain any advantage over the warrantee, is no doubt correct: or if the warrantee be the first to enter upon the land, and to make or cause to be made a settlement after the two years or more that have expired, I think that he must be preferred; and that neither the commonwealth nor any individual can take advantage afterwards of the condition broken, as long as he continues and keeps up the settlement and residence in the manner required by the act.

The courts of this state seem hitherto to have entertained the opinion, and to have laid it down as the law, that the land lying north and west of the Ohio and Alleghany, and Conewango creek, after being surveyed under warrants granted by the commonwealth, could not, where the warrantees had failed to commence settlements

within the term prescribed by the act of the 3d of April 1792, be entered upon by any other persons, nor be settled and improved by them, without their becoming trespassers, unless they had first obtained from the commonwealth "new warrants, reciting the original warrants, and that actual settlement and residence had not been made in pusuance thereof." In this construction of the act of 1792, I would have entirely concurred; indeed, I would have felt myself bound to have done so, from the decisions of the circuit and supreme courts in the cases already cited, if no other act had been passed by the legislature on the subject; although I am inclined to think, that it would very fairly have borne a directly opposite construction. For the ninth section directs, that in default of the original warrantees to make settlements and residence upon the land, that it shall be lawful for the commonwealth to issue *new warrants*, that is, what have been since called vacating warrants, to other *actual settlers*. These terms presented a difficulty in giving to the act the exposition which it received, and were held to mean other persons, *who were desirous to settle and improve*. 3 *Yeates* 277; 7 *Serg. & Rawle* 304. To justify this change and substitution of terms, it has been said, that the intention of the legislature would be better fulfilled, and all the words of the clause receive their full operation. And again, that the term *actual settlers*, employed frequently throughout the act, is not applied exclusively to him who has made and continued his settlement, but is used to denote one *who is desirous to settle*. If this latter be so, I have not been able to discover it; neither am I satisfied that the meaning of the legislature will be better promoted by changing the phraseology. In the third section, those who *have* settled, and those who are *desirous* to settle, are terms that cannot be mistaken. In the fifth section, the term "actually settled," is used to designate land that *has* been settled, and not land *to be* settled. In the eighth section, the deputy surveyor is directed to make a survey for any person, on his application, who *has* made an *actual* settlement, which, without a clear perversion of both the words and meaning of the legislature, cannot be made to mean a person who is *desirous* to settle. In the ninth section, the term "actual settlement" must be understood to mean a settlement *already* made, and not one *intended* to be made: and again, the term "actual settler," used in the proviso of this section, refers to, and was intended to designate a person who *had commenced* a settlement and was driven from it. So in the tenth section, the same distinction and meaning are manifest. In short, it appears to me, that throughout the whole of the act, that as often as the term "actual" is applied to, and used in connection with the term "settlement," or "settler," it was intended to convey the idea of a settlement which had been made, or at least commenced; or a settler who either *had been*, or was at the time residing on, and in the *actual* possession of the land. And I am likewise inclined to believe that this understanding of these terms throughout the act is necessary, in order to carry into effect the intention of the legislature; be-

cause it will be admitted by all, that from the act it is manifest, that it was not the design, or at least not directly intended, that the commonwealth should be paid for the land, at the rate of more than twenty dollars per hundred acres, besides making a settlement and residence, such as is mentioned in the act. As no warrant could be obtained without the purchase money being first paid, the only thing that remained after that to be done, to satisfy the utmost wishes of the commonwealth, was to make the settlement and residence as specified in the act. If, however, the warrantee neglected to do this within the time prescribed, is it not most reasonable to suppose, that the legislature intended that no other than an *actual* settler, or one who had previously commenced his settlement and residence upon the land, should have a new or vacating warrant for it? The commonwealth having received the purchase money for it from the original warrantee, the next great object was to have the land settled and improved; and by whom was this so likely to be done, as the man who had already given *earnest* of what he would do in this respect, by his having entered upon the land with his family, manifesting by his acts, to the world, his intention and determination to complete the settlement and residence required? But, according to the construction which has heretofore been put upon this act by the judiciary of this state, all that class of citizens who are without much money, but far the most likely to be willing to undertake and to perform this latter condition of settlement and residence, are entirely excluded; and hence the settlement and improvement of the land are necessarily postponed, until the moneyed class shall find it convenient, and their interest to do it. It cannot be denied, that it was the intention of the legislature in passing this act, to accommodate both these classes of citizens; and as my construction does not necessarily exclude either, it must therefore be more in accordance with their design and intention, and ought also for that reason to have been preferred. The construction as it appears to me, is fortified and strengthened by a provision contained in the tenth section; which directs, that in case of *actual settlers*, unless hindered by death, or the enemies of the United States, neglecting to apply for warrants for the space of ten years after the passing of the act, that the land shall be granted to "*others*," without the addition of "settlers:" showing pretty clearly, that where the settlements and residence required by the act had been made, but the purchase money not paid, that the lands might be granted to any other persons who would pay the purchase money to the commonwealth, without their being actual settlers. Indeed, that could not be, as long as the original settlers or those claiming under them, continued in the actual possession. It is clear, that this provision was introduced into this latter section, and the phraseology changed, with a view to have the purchase money, where none had ever been paid for the land, paid as early as it was thought would comport with the ability of actual settlers; and if they should neglect to pay after that period,

then to obtain it, and grant the land to the first settler or no settler, that should offer it.

Were it not however for other acts of the legislature, which have been since passed, on the subject of granting these lands, lying north and west of the rivers Ohio and Alleghany and Conewango creek, I should feel myself bound, as I have said, to adhere to what seems to have been the judicial construction of this act of 1792. But when I come to look at the acts of the 22d of April 1794, of the 22d of September 1794, of the 2d of April 1802, and of the 3d of April 1804, it is impossible for me to doubt for a single moment of the intention of the legislature to give the authority and the right to persons who were desirous of securing lands first by a settlement, to enter without a new or vacating warrant or filing an application for the same, upon lands which had been surveyed under original warrants, but not settled by the warrantees within the two years or any subsequent period.

The act of the 22d of April 1794, *Purdon's Dig.* 532, *sec.* 1, declares that "from and after the passing of this act, no application shall be received in the land office for any *unimproved* land within that part of this commonwealth, commonly called the *New Purchase*, and the triangular tract upon Lake Erie." The second section further declares that "*no warrant shall issue* after the 15th day of June next, for any land within that part of the commonwealth, commonly called the New Purchase, and the triangular tract, upon Lake Erie, except *in favour of persons* claiming the same by virtue of some *settlement and improvement being made thereon.*"

The tract of land commonly called the New Purchase, and the triangular tract upon lake Erie, are the same which were purchased of the Indians, at fort M'Intosh, in 1784, and of the United States: the first, of the Indians, and the second, of the United States; and every one knows, that these two tracts of land embrace all the land lying north and west of the rivers Ohio and Alleghany, and Conewango creek. This act, then, prohibits, in express terms, the receiving at the land office any application for unimproved land, or the issuing of any *warrant*, except in favour of persons for lands which they claim by virtue of some settlement and improvement made thereon, which lie within these two tracts. The direction and command are, that "*no* warrant shall issue," which is positive and peremptory. It will not satisfy the terms of this act to say, that *new*, or *vacating warrants* are not intended to be embraced, because the term "warrant," is general, and includes both *original*, and *new* or *vacating* warrants; and every land warrant that can be issued, must fall within one or other of these two classes; unless a warrant of acceptance, which is not applicable to the present case. Beside, I can perceive no clause or expression in this act, showing that any such distinction was designed. The next act, in order of time, was passed the 22d of September of the same year; by the first section of which it is enacted, that "from and after the passing of this act,

no application shall be received at the land office, *for any lands within this commonwealth*, except for such lands *whereon a settlement has been*, or *hereafter shall be made, grain raised*, and *a person or persons residing thereon.* The restriction contained in this act is equally positive and mandatory with the last. It extends to *all* the lands within the commonwealth, without exception; and it is difficult to conceive how any exception, in this respect, could be raised by construction. The terms of the act are express and unqualified. There is not even any thing contained in the title of this act, that would seem to indicate that the legislature intended to provide for the disposition of lands in one district or section of the state more than another. If so, it is clear, that after the passing of this act, no original, or vacating warrant could be issued; for no application could even be received for that purpose, unless the lands were previously or thereafter settled, grain raised, and a person or persons residing thereon. This act has not only prohibited the issuing of warrants for lands unsettled and unimproved, but has defined and set forth the nature and extent of the settlement and improvement that must be made upon the land, before a warrant of *any kind* shall be issued for it; so that, if the land forfeited by a warrantee, for not having made the settlement and improvement within the time prescribed by law, be not open to appropriation by settlement for any person who may please to enter upon it, after the forfeiture, without first having obtained a vacating warrant, it would appear, then, that after the passage of this act, these lands could not be disposed of in any manner or form known to the law, and that the warrantees might continue still to be the owners and holders of them, without ever making a settlement. Now, surely, such a thing has never even been dreamed of. Nobody ever supposed that the warrantees were discharged from the condition of settlement and residence; nor that the legislature had deprived the commonwealth of all remedy to take advantage of the forfeitures in such cases.

The next act was passed on the 2d of April 1802, and has a *specific* reference to the lands lying north and west of the rivers Ohio and Alleghany and Conewango creek; for it declares in the following words: "in order to prevent the confusion that would arise from issuing different warrants for the same land; and to prevent lawsuits, in future, respecting grants from the land office; under the act of April 3d, 1792," it is enacted, "that from and after the passing of this act, the secretary of the land office shall not grant *any new warrant, for land which* he has reason to believe *hath been already taken up under a former warrant;* but in all such cases, he shall cause a duplicate copy of the application to be made, on which duplicate copy he shall write his name, with the day and year in which it was presented, and he shall file the original in his office, and deliver the copy to the party applying: provided always, that on *every application* so to be made and filed, shall be certified on the oath or affirmation of one disinterested witness, that the *person making such application*,

or in *whose behalf* such application is made, *is in actual possession of the land applied for;* and such certificate shall mention also the *time when such possession was taken:* and the application so filed in the secretary's office shall be entitled to the same force and effect, and the same priority in granting warrants to actual settlers, as though the warrants had been granted at the time when applications were filed." This act is confirmatory of the construction and application which I have put on and made of the other acts; for it is predicated upon the principle of law, that no other than an *actual settler*, or some one on his behalf, was entitled to apply for a *new*, or *vacating warrant;* and directs what proof shall be adduced, not only of being in the *actual possession* of the land applied for, but of the time when he took that possession. From the express provision of this act, no application for a *new warrant* can be received, unless proof be made that the applicant is *in the actual possession* of the land. The warrant spoken of in this act, is described in the same terms of the vacating warrant, which is directed to be issued by the act of the 3d of April 1792, and substitutes the filing of the application and giving a duplicate of it to the applicant, for a *new*, or *vacating warrant.* This act appears to me to be so plain and positive in its terms, that it is susceptible of but one construction, which is, that an application is substituted by it, in place of a *vacating warrant;* and that no application can be received, except in favour of the man who has previously become an *actual settler, in the possession of the land*, and *still continuing in the possession of it.*

The act of the 3d of April 1804, followed the one which I have last noticed, and shows in the first place, that the legislature considered the act of the 22d of September 1794, as applying to and embracing the lands lying north and west of the rivers Ohio and Alleghany and Conewango creek, and that applications for these lands, more than other lands within the state, could not be received at the land office, unless a settlement had been or thereafter should be made upon them, as also grain raised and a person or persons residing thereon. It in the next place demonstrates that *applications* filed in the land office, by *actual settlers*, where the party was entitled, under the act of 1792, to a vacating warrant, are to be considered as substituted for *vacating warrants*, and to have the same force and effect, and that the party shall be permitted to make proof of his improvement and residence, as fully, and *with equal force and effect, as if he had obtained a vacating warrant.*

It has been said that this act furnishes evidence of the legislature having approved and acted upon the judicial construction of the act of the 3d of April 1792. 7 *Serg. & Rawle* 305, 306. It however does not present itself to my mind in this point of view; but rather evidences the contrary. It must be observed, that the terms of this act are such, as to embrace applications then filed, or those which might be thereafter filed with the secretary of the land office; and as it is only such applications as were made out in conformity to the

requisites of the act of the 22d of September 1794, showing that a settlement had been made, and grain raised on the land, and that a person was residing thereon, that are provided for by this act of 1804, it proves, that the legislature considered the act of the 22d of September 1794, as directly applicable to the lands lying north and west of the rivers Ohio and Alleghany and Conewango creek; and that any person was thereby authorised to enter upon them, for the condition broken, and to settle and improve them, that he might entitle himself to a warrant for them. Beside, I have already shown, that by the express terms of the act of the 22d of September 1794, no application for a warrant for land could be received at the land office for unsettled, unimproved and uncultivated land. Yet from the act of the 3d of April 1804, applications for lands, for which vacating warrants might have been issued under the act of the 3d of April 1792, might have been received and filed in the land office; but not without having been previously settled, improved and cultivated as directed and required by the act of the 22d of September 1794. In addition to this, it must also be recollected here, that the act of the 2d of April 1802, which has been recited and explained, prohibited the issuing of vacating warrants, and substituted the filing of applications in the land office, and the giving of copies of the applications instead of the warrants, and that in doing so, no applications were to be received for unsettled lands, but for such only as were settled and improved, and from those only, by or on behalf of whom, they had been settled. All which, as it appears to me, tends to repel the idea of the legislature having ever recognized or sanctioned the judicial construction of the act of the 3d of April 1792. These acts being all enacted *in pari materia*, must be construed as parts of the same act, and so as to give consistency to the whole if practicable. Now, by observing this rule, I cannot entertain a moment's doubt, but that the legislature have thereby authorised any person who may have thought proper to do so, to enter upon and settle lands lying north and west of the rivers Ohio and Alleghany and Conewango creek, which had been granted by original warrants to persons who had failed to perform the condition of settlement and residence; and thus to take advantage of the condition broken, without either obtaining a vacating warrant or filing an application therefor. Otherwise, the absurdity as well as contradiction will be imputed to the legislature, of having declared, that in no case shall an application for a vacating warrant be received at the land office, unless the land has been previously settled and improved by the applicant, or one from whom he derives his claim, and the applicant be in possession thereof; and that notwithstanding this, they have denounced such applicant a trespasser and intruder. If the legislature had even said, that applications for vacating warrants might be received from such persons as had settled upon these lands previously granted by original warrants, where the warrantees had failed to make settlements within the time prescribed, it would have

been sufficient to have authorised an entry upon the lands by such settlers for the condition broken, and to have taken advantage of it; but they have gone further, as I conceive, and have declared expressly, that applications for vacating warrants shall be received from no others than those who shall have settled, cultivated and improved the lands.

In the case of an estate held upon condition, I agree that according to the principles of the common law, its determination is not effected before entry of the grantor or those claiming under him. *Noy's Maxims* 81; *Co. Litt.* 202 *a*, 240 *b*; 1 *Shep. Touch.* 153. Hence a grant by the crown, of an estate forfeited before an injunction finding the forfeiture, is illegal and void. *Leighton's Case*, 2 *Vern.* 173; 7 *Co.* 36. But as the late Mr Justice *Duncan* observed in *Skeen* v. *Pearce*, 7 *Serg. & Rawle* 304, "where the law prescribes the mode and manner in which rights to lands, accruing to the state, by reason of any default in the grantee, shall issue (or be acquired), that mode, and no other, must be pursued." Here it is, as I think I have already shown, that any one who pleases may take advantage of it by entering upon the land, and making and continuing a settlement and residence, after the forfeiture by the original warrantee.

Time is said to be of the essence of the condition; which if not performed by the warrantee within the *time prescribed*, he shall claim no benefit under his warrant, from his subsequent performing or attempting to perform it. No doubt time is of the essence of the condition, so far as to determine when the land may be entered on for the condition broken; but where the warrantee, who has already paid the purchase money for the land to the state, and has been the first to make the settlement, improvement and residence upon it, in fulfilment of the terms and condition, and in discharge of the whole consideration upon which it was granted, is it not perfectly reasonable and equitable that his subsequent settlement, improvement and residence, should be accepted and taken by the state in satisfaction of all that was required of him at first to vest in him an absolute estate in fee-simple in the land? Seeing the state has his money, and he has been the first to make the settlement upon the land, it seems to me that he ought in equity and fairness to be allowed the full benefit of holding it under the original warrant, in the same manner as if he had complied with the condition of settlement, improvement and residence, within the time prescribed by law. It was uncertain how long it might have been before that the land would have been taken by any other; and therefore the state has been the gainer in thus obtaining all that was originally required for it, more early than it possibly could have been had from any other, the great object of the legislature, as set forth in the act of the 3d of April 1792, being substantially answered and satisfied. I am of opinion that the warrantee can not be required by the state to pay the purchase money a second time, and to take out a new or vacating warrant for the land.

I also consider this to be in accordance with the spirit and design of the legislature, as manifested in the sixth section of the act of the 20th of March 1811. *Purdon's Dig.* 543. The interest, as well as the desire of the state, was to have the terms and conditions upon which the land was granted performed as early as possible; and justice would seem to require that the land should be given to the first who should comply with them.

If the view which I have taken of this subject be correct, it follows, that where the original warrantee has been the first to commence a settlement upon the land, although not within the time allowed by law for that purpose, and is following it up, but the land is entered upon and his possession of it invaded by another, who builds a house upon the land and takes up his residence there, this other person must be considered a trespasser and intruder, and ought not therefore to gain any advantage from his unlawful intrusion; nor ought his violent and illegal conduct be suffered to prejudice the warrantee under such circumstances.

If *George W. Fell* entered first upon the land, under the owners of the warrant in this case, and commenced a settlement, improvement and residence, such as are required by the terms of the act of the 3d of April 1792, with an honest intention of completing the whole, and was engaged in so doing when *James Hamilton* came first on the land and commenced his settlement, and afterwards when *Alexander Hamilton* succeeded *James Hamilton* in this possession of *his* settlement and improvement, without the consent of *Fell* and the owners of the warrant, the plaintiffs below ought to recover the land. I do not think that the subsequent sale of the land by *Alexander Hamilton*, who was a mere trespasser, to *Thomas Campbell*, ought to place *Campbell* in a different situation from that in which *Hamilton* stood; for it appears that *Campbell* had full notice of *Fell's* improvement made upon the land before he bought, which was sufficient to have put him upon his inquiry, and to have ascertained from *Fell* whether he had any claim to the land, and under what right; and if he had then left the possession, why he had done so. When *Fell* commenced his settlement, whether before or after *Hamilton* commenced his, whether under the owners of the *Galbreath* warrant or not, and if under this warrant, and before *Hamilton*, whether he commenced it with a *bona fide* intention of working, such as the act of the 3d of April 1792 requires, were questions to be left to the decision of the jury as matters of fact; and if found in favour of the owners of the warrant, their case ought to be considered as falling within the principle established by this court in *Jones* v. *Anderson*, 4 *Yeates* 569, that the adverse possession of an actual settler, within the time allowed to the warrantee to make his settlement, was *ipso facto* a prevention. By the application of this principle, the *Hamiltons* and *Campbells* would be considered trespassers, and as having taken possession, at least of a part of the land from *Fell*, when he was entitled to the whole of it; and as having thereby pre-

vented him from improving the land in the manner he might wish, and certainly had a right to do. The wrong-doer has no good reason to complain of the application of this principle; it is only a just punishment inflicted upon him for his demerits, and at the same time a retribution to the party injured, while the state sustains no loss by it; for whether the condition of settlement, improvement and residence, be completed by the one or the other, the loss or gain to her is the same. See *Litt.* 334. Besides, I think it right upon the score of sound policy, in order to remove all temptation to commit a wrong or trespass; as in the case of an estate granted upon a condition against law, the estate upon this principle will be held good and absolute, and the condition void. *Co. Litt.* 206. Nothing short of twenty-one years adverse possession on the part of the disseisor can give him a right to the land. It is not the case of two actual settlers, as in *Crosby* v. *Brown*, 2 *Binn.* 124, where the elder settler, after having made some improvements upon the land, was prevented from continuing them by the violence of a younger settler, and left the land for several years before he took any steps to recover the possession from the younger, who still continued to hold it and to improve the land: it was held by this court that the plaintiff's claim or title to the land was not such as would enable him to bring and maintain his action at any time within the twenty-one years; and that it ought to be left to the jury to decide whether he had not relinquished his settlement. It must be considered as the case of a warrant holder who had paid to the state the whole of the purchase money, and had seated himself upon the land, performing the last act necessary to invest him with an absolute legal title in fee to it. It is even a stronger case than that of *Jones* v. *Anderson*, where the warrant holder had never taken actual possession of the land, nor attempted to make, either by himself or any other, a settlement upon it; but had lain by more than two years after the date of his warrant, and about five months after the confirmation of *Wayne's* treaty with the Indians, when the settlement under which the defendant claimed was commenced adversely to him, and continued without any threats or force whatever being used at any time on the part of the settler to prevent or deter the warrant holder from making an actual settlement upon the land.

The necessary conclusion to be drawn from the train of reasoning here offered is, if *Lodge*, *Walker* and *Probst* were the owners of the warrant, issued in the name of *Josiah Galbreath;* and *George W. Fell* made under them the first actual settlement upon the land, with a *bona fide* intention of making it *exclusively* the place of his abode and residence, by building a house or messuage thereon, suitable for his habitation, clearing, fencing, and cultivating at least two acres of the same for every hundred acres contained in the survey under the warrant, and residing thereon with such family as he might have, for the space of five years then next following the first commencement of his settlement; and again, if the work of such

settlement, improvement and residence were pursued, kept up and persisted in by *Fell*, with reasonable diligence, until *Hamilton* entered upon and took possession of the land; and these things are all matters of fact to be left to and decided by the jury, from the evidence that shall be given in relation to them; the plaintiffs below ought to recover. But if the jury should be of opinion, from the evidence, that *Lodge*, *Walker* and *Probst* were not the owners of the warrant, or that *Fell* did not settle the land first under them; or that he did make the first settlement, but not for or under them; or that it was not made with the intention above expressed and prosecuted, kept up and maintained with reasonable diligence, until the time that *Hamilton* took possession; then the defendant below ought to hold the land. But, inasmuch as these matters of fact were not submitted by the court below to the jury, under the view that has here been given of what the law is on this branch of the case, the judgment rendered there must be reversed, and a *venire facias de novo* awarded.

The fifth question has, in effect, been answered, by what I have said; for if the facts of the case shall be found by the jury, from the evidence that shall be given upon another trial, to be as I have stated they must, in order to entitle the plaintiffs to recover, it follows, that the warrant and patent to *Campbell*, for the land in dispute, were improvidently granted, and, therefore, cannot avail him.

Huston, J.—The word *settlement*, as applied to that occupation of vacant land, that is, of land not owned by any person, under a right derived through the land office, from the late proprietors or from the state, is very old. There are lands held by settlement, without other title, which commenced one hundred years ago. There are many hundreds of tracts which have passed from father to children, and from grantor to grantee, without office title, whose settlement commenced fifty, sixty, and seventy years ago. At one period of our history, from 1784 till December 1786, our then supreme court made some decisions which alarmed every body; and an act of assembly was passed, declaring all warrants which should issue for lands on which a settlement had been made, except to the settler, or his legal representative, should be null and void. And, soon after, the courts decided, that all such warrants which *had* issued for land occupied by a settler were void. The same thing had been decided, and was the settled law, before the revolution. See *Bonne* v. *Devebaugh*, 3 *Binn.* 175.

The law of December 1786, however, defined a settlement to be, "an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or going into the military service of his country." The above law, and the uniform decisions of our courts, except the period above mentioned, threw out of protection a class of improvements made and intended to keep off other settlers and warrant-holders, until he

who made some trifling improvement could sell it; and sanctioned and established the kind of settlement described in the act of 1786: and from the earliest times, no act of the legislature, and no decision of court, has permitted such settler to be evicted by any grant which could be acquired from the land office. (I except islands, and some tracts of country which, for a short period, &c. for good reasons, were not open to settlers.)

The act of the 3d of April 1792, was passed by men who knew the history of our titles and were not ignorant that settlements had been made, not for the purposes mentioned in the act of 1786, by men who never resided or intended to reside on the land improved, or to make it the means of supporting a family; and to guard against such abuse, used the term *actual*, connected with settler, and with settlement; and again defined, what, under that act, should constitute an actual settlement. After having provided that a survey should be made on every warrant, and for every actual settler without warrant, the ninth section says, "no such warrant or survey, to be issued or made in pursuance of this act, for lands lying, &c. shall *vest any title* in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made or caused to be made, or shall within the space of two years next after the date of the same make or cause to be made, *an actual settlement thereon, by clearing, fencing and cultivating at least two acres, for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man and residing or causing a family to reside thereon for the space of five years next following the first settling of the same, if he or she shall so long live.*" The supreme court of the United States have supposed two conditions were added to the grant: first, actual settlement within two years, and secondly, continuance of the settlement five years, and performing the acts prescribed. No such thing: by clearing, fencing, &c. to the end of the sentence, is a description of what kind of settlement would give title, and it was wisely provided. Young men, in the face of the law, have gone from home twenty or one hundred miles, commenced a dozen settlements in one month, and next year worked a week on each, and so on. This, and every thing like it, is not as directed by the law. And again, holders of great numbers of warrants have hired the same man to make, and, in their language, to keep up, twenty settlements or so many of the tracts for which they had warrants. The law of 1786 was, when enacted, supposed to be sufficiently particular—personal resident settlement, intention to make it the place of abode and means of supporting a family—continued from time to time; but all these might be simulated. This act prescribes when to commence, the quantity to be cleared and cultivated, the building a house, residence of a family therein and that for five years—these words "for five years," come instead of the words "from time to time," in the former law. This construction of the sentence, which from the first struck our own judges, cures all the bad grammar, and the supposed incon-

sistency, which was found by judges not acquainted with the nature and history of title by actual settlement, and can deceive no one who was acquainted with the law on improvements. There is another part of this sentence, which one side in court uniformly read in an under tone, and never afterwards mentioned. No warrant or survey *shall vest any title* in or to the land described, unless, &c.; sometimes when these words have pressed themselves on a court, the common law, as applied to contracts between man and man, and the learning on conditions precedent and subsequent, is brought in. The common law is declared to be in force, to a certain extent, by our constitution and several acts of assembly; but it is only in force until our own legislature make provision on the subject, and instantly the common law so far ceases and is extinct, and the enactments of our own legislature on that subject become the law of the land; and when our own statute, in terms which cannot be mistaken, says, no title to lands which it offers for sale shall vest, until a certain thing is done, in a certain way, there is and can be but one inquiry, viz., Had the legislature power to pass such an act? and to that question, in this case, there can be but one answer.

If the common law is at all to be resorted to on this subject, it will, as I believe, furnish a different rule as applicable to those who claim under a statute; and that rule is, that when a right is given by statute, he who claims that right must bring his case within the terms of the statute. What is required by law to be done, must be done, or no right attaches. And this rule is admitted and supported to its full extent by the supreme court of the United States, in *Wilson* v. *Mason*, 1 *Cranch* 45, 97, 98, as applied to grants of land under the laws of Virginia; and in that case a man who had paid his money, and got his survey returned before any adverse claim, but who, instead of performing what was required by the act, had substituted what he thought was equivalent, was declared to have no title in law or equity; and the owner of a subsequent office title, and who had full notice of all that had been done by his opponent, held the land; and in that case it was not imagined that any act of the state, claiming the forfeiture, was necessary. I proceed to quote the residue of section nine, observing that the whole section is comprised in one sentence: "and in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue *new warrants to other actual settlers*, for the said lands, or any part thereof, reciting the original warrant, and that actual settlement and residence have not been made in pursuance thereof, and so often as defaults shall be made *for the time and in the manner aforesaid*, which new grants shall be under and subject to all and every the regulations contained in this act: provided always, that if any such actual settler, or any grantee in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make

such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to hold the said lands in the same manner as if the actual settlement had been made and continued." If there could be any doubt on the construction of the first part of the sentence, this would remove it. Most clearly, by the first part, the claimant, whether he had a warrant or not, must make the actual settlement there described and then follow; and in default of *such actual* settlement and residence, &c. the land is to be regranted and so on as often as default is made; and in the proviso, again, we have the expression *such actual* settlement; it is not in default of making *an* actual settlement, it is *such actual settlement*, and in one place, *the* actual settlement.

There is no colour for the supposition that such actual settlement as is there described, could be dispensed with in favour of a warrantee, more than a settler without warrant. In default of such actual settlement, *new warrants* are to issue. The phrase "new warrants" can only apply to cases where warrants had before issued; and the provision, "that the lands shall be regranted so often as default of settlement occurs, and that every new grant shall be subject to *all* and *every* regulation contained in the act," ought to have put an end to all question as to whether the object of the legislature was to get the price of the land, or to increase its population and wealth and strength by securing an industrious and hardy population. It did not mean to give away its lands; but that its determination was never to part with the title until each tract was a cultivated farm, supporting a family, is most clear.

The proviso does not dispense with the necessity of *such* actual settlement, it only suspends, in certain events, the time within which it is to be made. To raise a doubt on the subject, you must, in the face of every provision of the law, assume that the warrantee is not as much bound to make *the actual* settlement directed, as if he settled without a warrant; and, in opposition to the universal usage of the English language, you must say, there is no difference between the meaning of the words "attempt," "endeavour" and "persist." Nay, more, that "persist in his endeavours" only means to make an actual settlement, by clearing, fencing, and cultivating, at least two acres for every hundred contained in one survey; that "erecting a house, for the habitation of man, and residing five years thereon," means, he shall make an attempt to settle on the land. Nay, it is still worse; you must say that, "if driven therefrom, he shall persist in his endeavours to make such actual settlement," means, that if he is driven therefrom, he need not return, and that, in such case, the expression "persist in his endeavours to make such settlement," has no meaning, and was not intended to have any meaning.

The owners of warrants, and those who settled without warrants, came early into collision, and on each side contended for a construction not warranted by the law. The grantees of warrants obtained patents, without even commencing a settlement, on certificates from

two justices of the peace that they had been prevented by enemies; and the persons claiming by settlement, contended that warrants were void unless settlement commenced within two years from date of warrant. The war raged during the whole of the two years, or during a great part of it.

This matter was brought before the supreme court of this state at March term 1800 (*The Commonwealth* v. *Cox*, 4 *Dall.* 170), and the decision was, "that in all events, except the death of the party, the settlement described in the act, continued for five years, must precede the vesting the estate; and that though the prevention by enemies continued the whole of five years, and the grantee persisted in his endeavours during all that period, yet he must complete the settlement after prevention ceased, or no title vested; in other words, the war excused during its continuance, but settlement must be commenced within two years after the peace, and be continued according to the act, or no title vested.

In 1802, the contest still raging, even to riots and bloodshed, an act of assembly to continue in force two years was passed, prescribing a mode intended to terminate the dispute. 4 *Dall.* 237. This proposed two questions. The answer to the first is as before, that the terms required by the act must be complied with; "for the legislature regarded a full compliance with the condition of settlement and residence as an indisputable part of the purchase, or consideration of the lands so granted." But the court gave full scope to the proviso, and decided that the time did not begin to run during the war, or was suspended during its continuance; and that where a person, within two years of the date of the warrant, or as the case stood, within two years of the 23d December 1795, the date of ratification of *Wayne's* treaty, sat down on land granted by warrant, and kept the warrantee from making a settlement, such person should not object that a settlement was not made, when he himself prevented the warrantee from making it.

On this subject there was no diversity of decision in the courts of this state. See cases hereafter cited.

But I cannot say as much of the construction of another clause of this section, viz. "in default of such settlement and residence, it shall and may be lawful for the commonwealth to issue *new warrants* to *other actual settlers*, for the said land, or any part thereof, reciting the original warrants, and that actual settlement and residence have not been made in pursuance thereof, and so often as default shall be made for the time, and in the manner aforesaid; which *new grants* shall be under, and subject to all and every the regulations contained in this act." This clause has given rise to a contest not yet settled, as to the nature and necessity of these warrants re-granting the land, and to whom they could be issued. The term *vacating warrant* is not in this act, or any other act on the subject, until 1804; it was not used in court for several years. It is now used, and used very improperly. Under the proprietary government, the legislature

never passed any law as to the mode of selling the lands ; or if they did, the king never confirmed such act. The proprietor was sole owner of the soil, and disposed of it on his own terms. The officers of the land office were his attorneys, in fact, and they, together with the commissioners of property, and the governor, for the time, changed these regulations at their pleasure. There was a time when these officers issued vacating warrants, and as the records of the land office are very defective, we know little of them : from my researches I would say, they generally issued at the instance of the warrantee ; and, in every case, the warrantee, if he had paid money, got a credit for that money, as the price of other lands. They never stated the reason of vacating, or at least generally they did not ; and in two of the three cases in which we know of their being questioned in court, the title under them was held null, because there was proof that the warrantee did not consent. After Mr *Tilghman* became secretary of the land office, none were ever issued. He was a good lawyer. In his time, if a man had a warrant and survey returned, with or without a patent, and it was discovered that a prior appropriation would take away the land, such person on making this appear to the officers of the land office, executed a release on the back of the warrant in the land office, and got a credit for the money paid, with which he could take another warrant for any vacant land. And under the state, by the act of the 29th of March 1792, the same thing was done, with this difference, that the deputy surveyor certified that the land was taken by a prior right, and except for the purpose of obtaining a credit for the money paid, no act of the officers of the land office was ever necessary to give validity to a second warrant for land, before granted illegally, either by the proprietaries or the state, unless it is necessary by this act. A warrant for lands purchased from the Indians, was sometimes unexecuted until a new purchase from the Indians, and then surveyed and returned, and perhaps patented on lands in such new purchase. Such warrant, so executed, gave no title under the proprietors or under the state, and land embraced by it might be taken and held by a new warrant, calling for land in the purchase in which it lay, or by settlement without warrant. Since 1794 (until the act of 1814), no warrant could issue unless to one who had complied with the terms of settlement in the act of 1794 ; if one who had not made such settlement got a warrant and survey and return, all was void, and any actual settler could take the land, and no vacating warrant or other act of the state or its officers was necessary. See *Johnson* v. *Thompson*, 6 *Binn.* 68 ; *Baxter* v. *Baker*, 4 *Binn.* 413.

I proceed to notice the several clauses of the act of 3d April 1792, and of other acts bearing on this subject.

Section three directs that a warrant shall issue to any person who may have settled or improved, or to any person who is desirous to settle and improve, &c., the grantee to pay the purchase money and

fees of office; and section ten gives a settler ten years to take out his warrant, and the time by subsequent laws is continued to this hour.

In section five is this provision, that the deputy surveyor shall not, by virtue of any warrant, *survey any tract of land that may have been actually settled and improved prior to the date of the entry of such warrant* with the deputy surveyor of the district, *except for the owner of such settlement and improvement.*

Section eight. On payment of his fees, and on application of any person who has made an actual settlement and improvement on the lands, &c., the deputy surveyor shall survey and mark out the lines of the tract of land to which such person may, by conforming to the provisions of this act, become entitled by such settlement and improvement.

Section nine, after declaring what under this law shall constitute the settlement by it required, whether with or without a warrant, proceeds to say, "and in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue *new warrants to other actual settlers*, for the said lands or any part thereof, *reciting the original warrants, and that actual settlement and residence have not been made in pursuance thereof*, &c." The grants are to be to actual settlers; not a word is said of *vacating* the prior warrant, no power is given to the officers of the land office to decide whether it has been avoided by want of compliance with the law, and in point of fact the warrants so granted, although called vacating warrants, recite the words of the act, and if any such warrant has declared the prior warrant to be *vacated*, it would, so far, be of no effect if the grantee of prior warrant could prove that he had complied with the terms.

If there could be any doubt under this act, I apprehend it is removed by subsequent laws. Before any second warrant could issue, came the act of the 22d of April 1794, expressly relating to this tract of country.

Section one. From and after the passing of this act, no application shall be received in the land office for any unimproved land within that part, &c.

Section two. No warrant shall issue after the 15th of June next, for any land within that part of this commonwealth called the *New Purchase* (embracing the county in question), except in favour of persons claiming the same by virtue of some settlement and improvement thereon. Then came the act of the 22d of September 1794.

Section one. From and after the passing of this act, no application shall be received at the land office *for any lands within the commonwealth*, except for such lands whereon a settlement has been made, or hereafter shall be made, grain raised, and a person or persons residing thereon. This has been repealed as to purchase 1768, and all prior purchases by the act of the 28th of March 1814, and as to that part of *New Purchase* east of Alleghany river by the act of the 10th of March 1817, but is in full force where the lands in ques-

tion lie, i. e. north and west of Ohio, Alleghany, and Conewango. After the case of *The Commonwealth* v. *Coxe*, already cited, the legislature, anxious to settle the titles in this part of the state, and to terminate disputes which were defeating the objects of the law and ruining both parties, passed the act of the 2d of April 1802. This act, "to settle contending claims to lands within this commonwealth, &c." had not the desired effect. It was abused as unconstitutional by those who always abuse a law for that reason, when there is no other objection to it, and by those who had forgotten, or never knew that by the constitution of this state, "the legislature shall vest in said courts such other powers to grant relief in equity as shall be found necessary, and may from time to time enlarge or diminish those powers, or vest them in other courts, as they shall judge proper." Now that a dispute affects very many people, and can not be terminated at law without a multitude of suits, and great delay and expense, is a well known foundation of equity jurisdiction, more than once acted on by our legislature; as the act of 1799 appointing commissioners to settle disputes under Connecticut title, &c. To proceed: In this law, and under hopes that the tribunal organized by it would terminate all questions, it is enacted, section four, "in order to prevent the confusion that would arise from issuing different warrants for the same land, and to prevent law suits in future respecting grants from the land office, under the act of the 3d of April 1792, it is enacted, "that from and after the passing of this act, the secretary of the land office *shall not grant any new warrant* for *land which* he has reason to believe hath been already taken up under a former warrant, but in all such cases he shall cause a duplicate copy of the application to be made, on which duplicate he shall write his name, with the day and year on which it was presented, and file the original in his office, and deliver the copy to the party applying; provided that on every application so to be made and filed, shall be certified on the oath or affirmation of one disinterested witness, that the person making such application, or in whose behalf such application is made, *is in actual possession of the land applied for*, and such certificate shall mention also the *time when such possession was taken;* and the application so filed in the secretary's office shall be entitled to the same force and effect, and the same priority in granting warrants to *actual settlers*, as though the warrants had been granted when the application was filed.

It must be observed, that this law relates expressly to warrants for lands for which a former warrant had issued. That they are here called *new warrants*. The term *vacating* warrant, as applied to the matter in question, had not been used by the legislature or by any court. That such application for such *new warrant* must be accompanied with proof of actual settlement and personal residence, and the date of such settlement must also be proved. That no time is prescribed within which a person residing on the land should apply, this is left as it stood under section ten of the act of the 3d of

April 1792, enlarged by the act of the 26th of January 1802, which extends time to actual settlers, for taking warrants beyond ten years. This act has not been repealed, but was to continue in force two years. But the term vacating warrant was introduced in court soon after this, and certain decisions made, which I shall presently notice, and this occasioned the act of the 3d of April 1804, which enacts, section one, "all applications of *actual settlers*, for lands lying north and west, &c., under the act of the 3d of April 1792, describing particularly the lands applied for and filed with the secretary of the land office, vouching such other requisites as are provided for by the act of the 22d of September 1794, to prevent the issuing of any more applications or issuing any more warrants, &c., shall, for two years from and after the passing of this act, entitle the applicant, his heirs and assigns, to all the privileges that an original or *vacating warrant* would entitle them to, and on the trial of all suits brought or to be brought, between warrantees and actual settlers, concerning lands situate as aforesaid, the actual settler shall be permitted to plead and make proof of his *improvement* and *residence* as fully and with equal force and effect, as if such settler had obtained a vacating warrant, &c." The rest of the section is not mentioned in this case.

The former act had said in terms that the settler's title should be good, unless a better was shown, without a new warrant, and this one says the same thing, and that he shall be permitted to prove his settlement in court, in suits brought or to be brought. The applying this rule of evidence to suits brought, offended the courts, it was supposed to imply some censure on some decisions. Let us now see what these decisions were.

The actual settlers were as unreasonable as the warrant holders. The warrant holders did not even for one moment suppose they could hold the land without complying with the terms of the act. This is abundantly proved by the testimony adduced by themselves, in the case of *The Commonwealth* v. *Coxe*. They collected provisions, appointed agents, and offered to furnish provisions, and give a part of a tract to any person who would settle on it; but they went too far—they employed the same man to settle on and improve a dozen tracts. This was so palpable an evasion of the law, that the men thus employed left them and began to improve for themselves, and with equal absurdity to work on and claim several tracts for each man by improvement. The settlers went further, they threw away the proviso totally, and held the warrant void unless an actual personal resident settlement on it within two years from its date, although the Indian war had lasted all the two years; and a man who went to the country first in 1798, would resist a warrant holder and tell him he had no title, would not permit him to comply with the proviso according to its terms, in short, would not hear of the grantee having two years from the treaty at Greenville, in December 1795. This matter was settled by our supreme court as I have

stated, and in settling it, they gave a caution to those who had thus settled before the two years after the treaty had expired, though no such person was before them; and I cannot find a word on the subject in the voluminous report of the argument of counsel. The court had decided in terms, (4 *Dall.* 200) that although the warrantee had begun to make the settlement, and was driven therefrom, yet if he did not complete it after the peace within the time prescribed, according to their construction of the proviso, the condition of actual settlement and residence was not dispensed with or extinguished; and in pages 201, 202, the court adhere to the construction, that in all events except the death of the party, the actual settlement and residence shall precede the vesting of the complete and absolute estate. Yet in the conclusion of the opinion, not vesting is dropped, and the court say, "if the lands are forfeited in the eye of the law, though they have been fully paid for, *the breach of the condition can only be taken advantage of by the commonwealth, in the method prescribed by law.* In no other circumstance than that of adding an opinion, on a point not discussed, to other points fully argued, could the court have said in one place the title did not vest, and in another, that if forfeited, the commonwealth alone could take advantage of it. The one was making it a condition precedent, the other subsequent; I have endeavoured to show that the law of neither applied, that it was a legislative enactment, which, on that subject, controlled the common law and was alone the law. The judge there cites, *Morris* v. *Neighman*, 4 *Dall.* 209, where some opinion was given against a settler who entered *before the two years had expired.* See also some points exactly in the same situation, 4 *Dall.* 242.

The two next cases, *Shippen* v. *Aughenbaugh*, 4 *Yeates* 328, and *Jones* v. *Anderson*, 4 *Yeates* 569, were each of them cases in which the defendant had entered within the time allowed the warrantee to commence his actual settlement; and in the first of them had actually resisted the warrantee and prevented him; in the last the warrantee had never come near the land, but it was held that the defendant, settling down on the land before the two years from the 22d of December 1795, was resisting the warrantee, and preventing him from complying with the law, although such warrantee never crossed the Alleghany river in his life, or offered or even spoke of making a settlement on the land. And the second defendant, although he had no application filed under either the act of 1802 or of the 3d of April 1804, could not give it in evidence, because filed after the suit was brought; nor could he give any evidence of his actual settlement and residence—in other words, that the act of the 3d of April 1804 was, so far as related to suits then brought, unconstitutional; and the court say, in page 573, "the application and settlement would be evidence in a suit brought by the defendant after being turned out."

These two last are *nisi prius* cases. The same questions arose and were argued in bank in *Hazard's Lessee* v. *Lowry*, 1 *Binn.* 166,

and in *Wright and Porter* v. *Small*, 4 *Yeates* 562, and nothing like the opinions expressed in the two preceding cases is found; though if adopted it would have settled both the cases: and the case of *Wright* v. *Small*, all the improvements of the defendant, made after the plaintiff's warrant, were given in evidence; and further, the doctrine of improvements, their prosecution to actual residence, and their continuance as fully gone into.

In *Cosby* v. *Brown*, 2 *Binn.* 124, the first position of the judge in *Jones* v. *Anderson* is overruled, and much more, for it is there decided that although a man is actually resisted or actually driven from his settlement commenced, he cannot retire from the ground and say he has been prevented, and on this ground support an ejectment at any indefinite time afterwards short of twenty-one years. Such unreasonable delay may take place as to induce the younger settler, who had resisted another, to suppose that other to have relinquished his title, and in that case it would be unreasonable that the labour of years should be swept away.

In *Young* v. *Beatty*, 1 *Serg. & Rawle* 74, the residue of the decision in *Jones* v. *Anderson* was overruled, and even Judge *Yeates*, who decided *Jones* v. *Anderson*, agreed that residence of actual settlement on a tract granted by warrant and surveyed and returned, which settlement was commenced more than two years after *Wayne's* treaty, must be received in evidence; he appears to adhere to his former opinion, to vacating warrants, and that the act of the 3d of April 1804 was null. But Chief Justice *Tilghman* and *Brackenridge* say, "there can be no doubt that a vacating warrant, *issued after the entry of the defendant, would confirm his title*, even supposing it not to be good without such warrant, *because the title, being in the commonwealth by the default of the plaintiff in not complying with the conditions of sale, may be granted to a third person at any time, and it is immaterial to the plaintiff whether such grant be made before the entry of such third person or after.* In this case the plain and clear proposition is asserted, that unless the conditions expressed in the act of the 3d of April 1792 have been complied with, the title remains in the commonwealth, and is not in the warrantee who failed to comply. Our supreme court had twice decided the same way before in *The Commonwealth* v. *Coxe*, and *The Attorney-General* v. *Grantees*. Judge *Washington* had so decided in *Balfour* v. *Meade*, 4 *Dall.* 368, and before in *Huidekoper* v. *Douglas*. But the supreme court of the United States had decided otherwise in this last case, on appeal, 4 *Dall.* 392; but our supreme court never changed its decision, though some of the judges of that court, sitting in the circuit court, seemed to think themselves bound by the decision of the supreme court of the United States.

The opinion in *Young* v. *Beatty*, when duly considered, made an end of all question as to the necessity of a vacating warrant, as between an actual settler and an original warrantee who had not complied with the terms of the law. If, in the language of that and the other

cases mentioned, the title never passed to the warrantee (in the language of the act "no warrant shall vest any title," &c.), the title was in the commonwealth; the warrantee who had not made the settlement, could not, after two years, call on any person in possession to show any title, unless he had some contract with such settler, or had been prevented by him within the two years; and the people and the profession thought the question at rest.

Seven years after came the case of *Skeen* v. *Pearce*, 7 *Serg. & Rawle* 303. It is, all things considered, the strangest case to be found in any law book. We are not even told whence it came; no facts; no argument of counsel; no opinion of the court from which it came is to be found; whether the point occurred in the cause, or was made by counsel in argument, we know not.

"The single point," says the judge, "whether any person, without obtaining a vacating warrant or filing an application, can acquire a title to lands by entering into, making a settlement, and procuring a survey, for which another person had previously obtained a warrant, and had a survey made under the act of the 3d of April 1792, but had not complied with the condition of settlement and residence required by the act;" and this broad abstract question, not incumbered by circumstances or limited by time, is answered broadly, that he cannot.

No notice is taken of any decision of any court, as to the nature of the title acquired by the warrantee under that act. It is not reasoned on. It is assumed even without quoting the law. "For this condition broken, the state alone could enter." The term "actual settler," it said, "employed frequently in the various sections of the act, is not applied exclusively to him who had made and continued his settlement, but to one who is desirous to settle and improve, as distinguished from a warrantee." The words "actual settler" are used in the proviso as distinguished from warrantee, but must be construed to mean a person who had already commenced his settlement; and again in section ten; and can thus only mean one who has actually resided on the land; and is not used in any other part of this act; and neither in this or any other act, nor in court, nor in common parlance, was the term "actual settler" ever applied (except in this opinion) to any other than to one actually residing on, or, at least, working on a tract of land with intention to reside; it cannot be applied to one who intends to settle; it is used to distinguish one who has settled, from one who intends to settle.

What is said about an inquest of office, I shall only notice by saying, none was ever held, by common law, in this state, only when expressly directed by act of assembly: these are very different from inquest of office at common law; and I have shown two cases decided by that same court, composed of the same judges, where land granted by the state, on warrants and money paid, and surveys returned, were decided invalid—in one case a subsequent warrant, and the other an actual settlement; and no one thought, of what

never existed, an inquest of office, or a vacating warrant to be issued by the officers of the commonwealth, who never issued one, and, if it is to be issued, have no power to issue one, or direct one: although filing an application is mentioned in the question, the conclusion to which the judge comes is, that a vacating warrant is absolutely necessary, in order to acquire any title to land granted over to a warrantee who never attempted to fulfil one of the terms prescribed.

No regard is paid to acts of assembly. By the act of September 1794, no application can be received, except for land on which a settlement shall have been made, grain raised, and a person residing thereon. By the act of the 2d of April 1802, no *new warrant*, that is, what is now called a vacating warrant, shall issue; but he who wants one, shall file an application and proof of his actual settlement and residence on the land, and the time when his improvement began; and this application shall have the same force and effect, and give the same priority in granting warrants, &c. But the courts, or rather some judges at nisi prius, would not allow of these effects in court. Then came the act of the 3d of April 1804, expressly referring to the act of 3d April 1792, and the act of the 22d September 1794, and directing that applications filed agreeably to these, stating actual, personal, resident settlement, grain raised, and a family thereon at the time of application, and proof when settlement commenced, should have the same effect as a vacating warrant. Now both these last acts were direct declarations that no vacating warrant was necessary; that no adjudication of any officer of the state was necessary. Nay more, they were declarations that title to such land should be acquired by actual settlement, and that, so far from any new warrant being necessary, the state would not grant any such new or vacating warrant. Nay more, by the act of the 1st March 1811, such settler who has his survey returned, and the deputy surveyor is ordered to return it, is to get his patent on a warrant of acceptance and payment of the money, or giving a mortgage for it, without any vacating warrant ever issuing. But more; by the act of 1792, the actual settler was allowed ten years in which to take his warrant and pay his money and interest: that time, by sundry acts, is still extended, but his interest still runs on. Then we come to this; the laws say you may settle; may, after settling, file your application, specifying the date of interest, but we grant no vacating warrant; you may patent without such warrant; and all this you may do now, or hereafter, as suits you; and the case of *Skeen* v. *Pearce* says all this may be true; but although you have settled agreeably to law; are to pay interest from settlement; are allowed time to apply and pay, and that time often extended, you are, all this time, liable to be turned off by a man who has no title—we know he has no title; but the state must do a certain act—she has passed several laws, but they do not come up to the common law doctrine as it stood two centuries ago; the acts of assembly quoted go for nothing; you must move from your farm, and stay away until

the state repeals the act of 1802, and passes one restoring vacating warrants, and then you may bring suit and recover the land.

There may possibly have been a state of facts to which the doctrine laid down in *Skeen* v. *Pearce* may have been correctly applied; as a general or universal rule, it is in the face of every enactment of the legislature; it is, to the extent laid down, supported by no authority; is inconsistent with *Young* v. *Beatty*, and, moreover, as a general rule, is expressly overruled in *Riddle* v. *Albert*, 14 *Serg. & Rawle* 841. In that case, the plaintiff claimed under a warrant, survey and return, but had made no settlement; the defendant offered to show a settlement, in 1798 or 1799, and continued possession ever since, together with a warrant (not a vacating one) in 1818; a survey, return and patent; this was rejected by the common pleas, on the authority of *Skeen* v. *Pearce*, and the judgment reversed, for this error, unanimously, by this court; and surely, if the evidence could not avail the defendant, it ought not to have been received; it would not be error to reject it. This court then say, "whether the defendant's title would have been good on the disclosure of all the circumstances of the case, is not now to be decided; but, surely, he had a right to show that the legal title had been granted to him by the commonwealth. There was error, then, in rejecting the defendant's evidence, for which the judgment must be reversed."

There is another great mistake in *Skeen* v. *Pearce*; it is there supposed, that on application of a settler for land previously granted by warrant, there is something like a trial and decision by the board of property and the officers of the land office. That it is done on examination of parties and witnesses, and a solemn adjudication, that the warrant before granted is null, and shall be vacated. Now all this is mistake of fact and of law. The owner of a warrant before granted, is not cited nor heard; the only evidence by law, and the only evidence in fact, produced, is, the settler, along with his application and proof of settlement, &c., produces a survey by the deputy surveyor of the district, of the lands for which he applies, together with a certificate of said deputy surveyor, that the land (if the fact is so) was granted by a warrant, specifying the name of the warrantee and the date; and that no settlement has been made by the owner of said warrant; no witnesses are examined, no trial is had, no decision is made; the application is received and filed, and a new warrant, reciting the former warrant, and that the owner has failed to make the settlement, directed by law; or, since 1811, a warrant of acceptance and patent issues at once; no decree that the former warrant be vacated.

This new warrant or patent is at the risk of the grantee. If the owner of the former warrant contest it, the question, whether the first warrantee had right or no right, is to be tried in court, as all other questions of title are tried, and the facts stated in the new warrant must be found in court to be true. The certificate of the deputy surveyor before mentioned, is not conclusive; it would, after great

lapse of time, be *prima facie* evidence; in a recent case, it would hardly be so.

On a careful examination of all the acts of assembly and all the decisions, I must conclude, that as a general rule, the case of *Skeen* v. *Pearce* is not law. And certainly not in this case, where the defendant had complied literally and strictly with the requisites prescribed by law.

I come now to the particular exceptions in this case.

The facts contained in the plaintiff's offer in the bill of exceptions: viz., that *Walker* and *Lodge* took out this and other warrants, put them into the hands of the deputy surveyor, procured surveys to be made, and paid the surveyor, &c., were evidence to prove that *Lodge* and *Walker* were the owners of this and the other warrants. To understand this, we must recollect, that at all times in Pennsylvania, it has been usual for a man to apply for warrants in the names of different persons, generally without those persons knowing any thing of such warrants, until called on to make a deed poll for a nominal consideration, to the person who applied and paid for the warrants. At times, rights were obtained on locations and applications, on which nothing except the officers' fees was paid at the time of obtaining them; and after the lapse of some years doubts have arisen as to who really was the owner of such locations and warrants. As to locations, he who procured and proved the application to be made, has been proved by proving the handwriting in the original application on file, or by proving who obtained the survey and paid the surveyor. All this is also evidence to prove a right to a warrant; but as to a warrant, there is better evidence. There was, from 1 July 1784 until the office closed in September 1794, a day book or blotter, called from the name of the chief clerk, in whose handwriting it is, *John Keble's* blotter; in this is found, I believe, in many instances, the name of the person who actually paid for every warrant or list of warrants, in that time. Extracts from that book, under seal of the secretary of the land office, to whose office those books are transferred, are evidence, by act of 31st March 1823. The lands west of the Alleghany, were taken upon warrants paid for by Judge *Wilson*, *John Nicholson*, *R. Manis* and many others, none of whom were ever in or near that country, but they had agents who procured the surveys, and paid for them money furnished by the owner. The payment of surveying fees is then very equivocal evidence of ownership; and when better evidence is within the power of the party claiming, is not produced, ought to weigh but little; or rather, ought to have no more weight than secondary or circumstantial evidence has, when direct and positive evidence, in the power of the party, is withheld; and so the court ought to have instructed the jury. There is no error in admitting what was proved; but the law on that defective evidence was not correctly given to the jury, to whom it ought to have been left, whether there was sufficient evidence of ownership.

The second and third bills of exceptions were of declarations and acts of *Walker* and *Lodge*, and there was no error in admitting them; but whether these declarations and acts were of any validity or ought to have any effect in the cause, depended on whether the first was made out to the satisfaction of the jury, viz., that *Walker* and *Lodge* were the owners of these warrants. If the jury were satisfied that *Lodge* really paid for these warrants and owned them, then his declarations that *Walker* and *Probst* were equally interested with him, must go to the jury as evidence of some interest also in *Walker* and *Probst*; but if there was not evidence to satisfy the jury that *Lodge* was the owner, then his declarations that he was owner, and that the others were partners or agents of his, go for nothing. A man cannot make evidence for himself, his declarations are not evidence that he was owner, and of course not evidence that he was owner with others, or that these others had any right.

The fourth bill of exceptions. The declarations of *William Fell* were evidence that his son *G. W. Fell* began to improve under him. The effect of that improvement I shall notice hereafter.

The fifth bill is similar to the fourth, and subject to the same remarks.

The sixth bill of exceptions, is to a matter in which the court committed no error in rejecting the evidence; but in which there was manifest error in the charge of the court, or rather of the associate judges, for the president did not concur.

In Pennsylvania an ejectment may be sustained by the *cestui que trust*, in his own name or in the name of his trustee, or the trustee may, and often does bring ejectment in pursuance of his duty to the real and beneficial owner. The person whose name is used by another, who takes out and pays for a warrant, is usually called a trustee for that other. This is often very incorrect, for the person whose name is used, has not a spark of interest either legal or equitable; although at the trial no one knows whether there was in existence any such person as *Josiah Galbreath*, yet I know such a person well. If he never took out this warrant nor paid a cent for it in any way, he had not enough of interest to prevent an escheat if the owner died without heirs, and if he should bring an ejectment for these tracts as his own right, and at the trial it was proved that he did not apply for or pay for this tract of land, he could not recover against any person in possession, unless it was proved who applied and paid for it, and that the suit was for that person. If, as was the case here, *Josiah Galbreath* did not bring this suit, it must be shown at the trial who did bring it, and that it was brought by the person and for the person really the owner of that warrant. If any other than the real owner can sue in this name and recover, then every other person in the state may sue and recover, and that without showing any title. Now, our titles and proceedings in courts have been much censured, but are not so bad as that a man who has laboured on and improved land for twenty years and

eleven months, can be evicted by any and every man in the state. It was thus a great error in the associate judges to say, that although it was not known for whose use, or at whose instance this suit was brought, and though it was admitted by the plaintiff's counsel it was not brought by or by the direction of *Josiah Galbreath*, yet there might and ought to be a recovery of the whole tract for whom it might concern.

We had a case in this court, some years ago, *Grey for the use of* ——— v. *Holdship*. The cause was tried without the counsel stating, and the court refused to compel them to state, for whose use it was brought, and by this means all the persons who would have pocketed the money were examined as witnesses, without objection, at the time they were offered. So in this case it seems the heir of *Walker* was examined. I do not know how counsel who respect themselves, can offer to try a cause in this way, and no court ought ever to suffer a recovery in such case. I mean where it is conceded the plaintiff on record has no interest, and where it is not known for whom the suit is brought.

The next portion of the charge, viz. as to the evidence of ownership, I have remarked on already.

The next part of the charge is, that a man who has obtained a warrant and survey in that district of country, although he has never been on the land until 1798, more than two years after the peace, has still a right to the land. That if on going to the land in 1798, he finds a settler on, who claims by actual settlement, and without a vacating warrant, the fact of such settler being on the land is itself a prevention, and excuses the owner of the warrant from settling according to the law; and that—although such actual settler procured a vacating warrant the 9th of January 1805, and a survey in March following, and a patent in 1806, accompanied with proof of continued actual residence from 1798 till the trial; and that such settler had no right to enter without a vacating warrant; and he must give way to the owner of the warrant. The supreme court of this state in *The Commonwealth* v. *Coxe*, 4 *Dall.* 170, decided, that a patent obtained by a warrantee who had not made the settlement required by the act, gave no title, unless accompanied by proof of the actual settlement; and again in *The Attorney-General* v. *The Grantees*, &c., 4 *Dall.* 237, decided, that no title vested in the grantee of a warrant, unless he, within two years of the peace, complied with the terms of the law, and continued his actual residence five years. No decision contrary to these was ever made by the supreme court of this state. The grantee of a warrant had a right to enter for the space of two years, to make his actual settlement according to law; if he did not enter for that purpose within two years of the peace, and was not prevented during those two years, his right of entry was gone, and no title vested in him. How a man can support an ejectment for a tract of land, who has no title to it vested in him, and no right of entry, I cannot conceive. To him it matters not how

the person in possession came there; whether the state can turn him out of possession or not, is of no consequence; he is safe against one who has neither title to the land, nor right of entry into it; this is settled, if any matter of the law of ejectment be settled.

The associate judges are mistaken in another matter. There has been no decision, that settling on land, for which a warrant has been granted, after two years from peace, nor that a settler resisting, after two years from peace a warrantee who had not improved within the two years, excuses the warrantee from complying with the terms of the law. It cannot do so. It is absurd to say, an act done in 1798 shall excuse a man for not settling on land in 1796 or 1797.

Even in *Jones* v. *Anderson*, 4 *Yeates* 569, which in more than one respect goes beyond the law, the decision is put expressly on the ground, that the supposed prevention occurred within the two years. "The warrantee," says that case, "was entitled to a period of two years after the ratification of the treaty at fort *Grenville*, 22d December 1795, wherein he might make his settlement. But instead of allowing this full interval of two years, the unlawful entry was made upon the land within the period of seven months, by those under whom the defendant claims: viz., in May 1796." And to remove all doubts on this subject, Judge *Yeates* himself says, in *Young* v. *Beatty*, that in all the cases where this point had been decided, the entry by the settler was within the two years.

Before I speak of the vacating warrant, I must notice the remaining part of this charge. The judges say, "the vacating warrant dated in 1805, was obtained on the representation, that the warantee had failed to comply with the law; but that failure having been occasioned by the defendant, or the man under whom he claims, amounts to such a misrepresentation as will make the vacating warrant void. For had the state of the facts been known to the officers of the land office, they would not have issued the vacating warrant." And again, "and this being the decision of this court, founded on former decisions of the supreme court, which have now become the law of the land, it leaves nothing for the jury to decide on this point, but to give a verdict for the plaintiff, if satisfied of the ownership of *Lodge* in the warrant of *Galbreath*."

It is here that one of the *Fells*, and four of the family were examined for the plaintiff, says, that in *August* 1799 *Hamilton* and *G. W. Fell* met off the land, and *Hamilton* told *Fell* if he caught him on the land he would whip his guts out. This witness fixes the time with great positiveness. Now the four first witnesses of the plaintiff prove positively that almost all the work done on this tract by *G. W. Fell* was after August 1799, in the fall of that year; two of them mention October, and more than one of them swears that *G. W. Fell* worked some time there, and planted potatoes in the spring of 1800. *Hamilton* continued there until the winter of 1799 and 1800, and sold to *Campbell* who moved on, and no threats by him are intimated, though it was after he came that *G. W. Fell*

ceased to do any thing there. Now this might have induced the court to leave as facts to be decided by the jury, whether any threats were ever used, and whether a man who was not deterred from working by the threats, as long as he who threatened remained in the country, was frightened away by those threats after he knew *Hamilton* had left the country; and it is quite possible if so left by the court, the jury would have found one or both of them in favour of the defendant, and that the officers of the land office would have issued the vacating warrant if they had known every fact as proved at this trial. But if this threat was made, and if *G. W. Fell* in consequence of it had never again gone upon the land, it would not, under the facts in this case, have made the plaintiff's case any better. All right under the warrant had ceased—even the right to enter could, in *G. W. Fell*, be only that right which every person had to enter and settle on vacant land. Even if he had begun first to improve and was driven off, he could not lie by for ever, see *Campbell* purchase and pay, and build a house and barn, and clear a farm, and take a warrant, get a survey and patent; and give no notice for half a lifetime. In the case of *Cosby* v. *Brown*, 2 *Binn.* 124, *Brown* had built a house, cleared and fenced land, and sown it with grain in 1797, and went away in the winter, returned in the spring and found *Cosby* in his house, and was driven away by threats; he said he would resort to the law, but went away and stayed till 1805, when he brought ejectment, and his delay postponed him by the unanimous decision of the supreme court. This decision was in 1809.

I had omitted *Patterson* v. *Cochran*, 1 *Binn.* 231, in the supreme court, where the right of the warrantee to recover in ejectment where he had not made any settlement, is expressly put on the ground of actual prevention, by a person who had settled within two years after the peace.

I am of opinion there are many errors for which this judgment should be reversed and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Rush *against* Barr.

Whenever the legal title to land is in one person, and the real interest in another, they form but one title, and the statute of limitation does not run between the holders of such title, until the trustee disclaims and acts adversely to the *cestui que trust*; and such disclaimer must be made known.

Fraud prevents the operation of the statute of limitation, and it does not commence to run until the discovery of the fraud.

ERROR to the common pleas of *Armstrong* county.

This was an action of ejectment by *William Rush* who survived *Victor Dupont*, assignee of *Archibald M'Call* against *Margaret Barr*, for a tract of land; and the question of law which was presented, arose out of the following evidence.

The plaintiff, to support the issue on his part, produced as a witness *Hugh Wason*, who being duly sworn testified as follows, to wit, "in the last of October or 1st of November in the year 1795, *William Wason* and myself came out and cut logs for a cabin; we hauled the timber early in the spring of 1796; there was a company of men came out past our improvement; Judge *Barr* and *Thomas Barr* were along, they built a cabin, and we discharged them, and told them *Billy Wason* claimed on his improvement. They were a stronger party than us, and they were not willing to quit. My brother *William Wason*, went to the settlement and brought out his family, and left me to keep the house: we were out several weeks before the *Barrs* came out, and when we discharged them the logs were cut and the foundations laid: there were logs enough to build a cabin; there was a shed built when we first went out, which was not in the lines of the tract in dispute; we were on the tract when the *Barrs* came out, and we discharged them from making their improvement. In the summer of 1796, *William Wason* cleared from three-fourths to one acre, planted it in potatoes; he staid until harvest and then went into the settlement to take up our harvest; he came out with Mr *M'Call* in August, and we articled with him. In the fall of the same year *Thomas Herron* came out and purchased from *William Wason;* during this time the *Barrs* never came to do any thing on the land; we had, before *M'Call* came, run out our lines to suit ourselves, without reference to the old lines. I moved out of this county in 1797; the *Barrs* never until then done any thing, but located the cabin. The logs for the cabin were cut principally on the tract in dispute; we paid no attention to lines; the others we cut on the tract where *Herron* now lives. *Herron* moved his family on the tract; *William Wason* had left in the fall of 1796. My brother *William Wason* articled with *M'Call* for two tracts,

neither of them is this one. I sold to *Milligan*. This tract is one and *Herron's* the other."

The plaintiff then, further in support of the issue on his part, offered in evidence a warrant of acceptance to *Archibald M'Call* the assignee of the plaintiff, for thirteen tracts of land on the west side of the Alleghany and Ohio rivers, and Conewango creek, of which the tract in dispute is one. Which testimony so offered, the defendant by his counsel did object to, and the court having sustained said objection rejected the testimony so offered; to which the plaintiff excepted.

The plaintiff then gave the following evidence by *John Cowan*. "In the month of March 1796, *William Wason*, with his wife and family, was living in a cabin erected on the land in dispute, and in the same spring cleared about one acre of the land and put it in corn. *Wason* remained on the land till the following harvest, and then brought out his father and mother, and put them into the cabin to keep the possession. When winter set in, they all returned to the settlement. The following year, perhaps, *William Wason* sold his right to *Thomas Herron*, who in the same year moved into *Wason's* cabin. Shortly after that, *Herron* told me that he had sold the same land to his brother-in-law *Witherson*, in order to hold it. *Herron* then moved off the land, and gave up the possession to a son of *Witherson's*, who continued to reside there on the land, in the same cabin, till the spring of 1798, when *Thomas Barr* and *Robert M'Dowell* went into an empty cabin, without a roof, which had been built on the same land and was known by the name of *Barr's* cabin. The day following that on which they came, I was at their cabin, and either *Barr* or *M'Dowell*, in the presence of the other, told me that if they thought the father of *Witherson* would come on, they would proceed no further in making their improvements; but, after pausing a little, said they would go on with their improvement at any rate. They covered their cabin and moved into it. Both *Barr* and *M'Dowell* told me they had bought the land from *Herron* and were to pay the same to *Herron* for it that he had paid to *Wason*. *Herron* told me the same thing. *Witherson* left the land when his uncle sold it."

The plaintiff then offered a bond from *William Wason* to *Archibald M'Call*, dated the 11th of August 1796, conditioned for the settlement of the land in dispute; which, being objected to by the counsel for the defendant, the court overruled the objection, and admitted the evidence.

The plaintiff then further gave in evidence, an agreement between *William Wason* and *Thomas Herron*, dated the 11th day of August 1796.

An agreement between *Thomas Herron* of the one part, and *Robert M'Dowell* and *Thomas Barr*, of the other part, dated the 26th of May 1798.

The plaintiff then called as a witness *Benjamin Leisure*, who testi-

fied as follows, viz. "I was present at the execution of an agreement between *Thomas Barr* and *Robert M'Dowell*, at the end of which, they entered into the before mentioned agreement; by which, as I understood from all the parties, that *Barr* and *M'Dowell* were to keep *Herron* clear of *M'Call*, and that they were to continue the the settlement *Herron* had bound himself to maintain. I first knew of *Barr* and *M'Dowell's* improvements, in 1797. I came out in 1796; the cabin was fourteen or eighteen feet square. The promissory note, dated 26th May 1798, was given by *Thomas Barr* and *Robert M'Dowell* to *Thomas Herron*, at the time of making the agreement, as a payment of the purchase money of the land in dispute; and at the time the note was given, I signed my name thereto, as a witness; but I do not recollect whether the note was for part or in full of the purchase money."

The plaintiff then gave in evidence by *George Ross*, Esq. as follows: "I went to make a survey for *John Titus*, I think it was in 1803, 1804 or 1805. *Titus* wanted me to run in on the land in dispute, to fill his survey, as he was the oldest settler. I went to run in the same land, but was discharged by *Thomas Barr* and *Robert M'Dowell*, who told me they claimed the land under *Archibald M'Call* through *William Wason* and *Thomas Herron*. I then refused to go on the land in dispute."

It was then admitted that the title of *Archibald M'Call* was in the plaintiff.

The plaintiff then gave in evidence the testimony of *John Titus*, as follows: "I came to the country in March 1796, and saw a cabin erected on the land in dispute, in which *William Wason* was then living, with his family. In the same year, *Archibald M'Call*, and myself, went to the cabin; *M'Call* and *Wason* then entered into an article for the land; shortly after that, *Thomas Herron* called on me to witness that he had sold the land to a boy named *William Witherson*, who was present at the time, and that he had given up his right to the boy. Some time afterwards, perhaps a year, while Judge *Ross* and *M'Dowell* were surveying a tract of land belonging to me, *Robert M'Dowell* told me, in the presence of the judge, that he held the land under *William Wason's* claim and *Archibald M'Call*, and ordered them not to run into it. I asked *M'Dowell* if he held under his own settlement, and if he did, I would run into the land; he said that he did not hold the land under his own settlement, but under that of *William Wason*."

The defendant, on his part, to sustain his issue, gave in evidence as follows:

John M'Dowell, sworn, saith, "twelve of us came out in March 1796, and had built two or three cabins before we went to build *Thomas Barr's*. On Monday we went to build his. I saw *Wason's* improvement, it was burnt on Sunday, the day before *Barr's* cabin was raised. We saw on that day *William Wason*, *Hugh Wason* and

others; *Wason* told me we were improving on his tract; he said there was about two hundred acres in each tract. We built the cabin, roofed it, and cut out a place for the door; we commenced deadening, I think it extended to half an acre; there was nothing done by *Thomas Barr* or *M'Dowell* in 1797; the day after we built *Barr's* cabin we built mine; we came back in two or three days; *William Wason* then had a cabin on the land. In February 1798 they came out, and in May they had about eight acres cleared. My brother lived on it till his death. I don't recollect what was done with the eight acres, there was corn raised on it that summer, about four acres. *Robert M'Dowell's* improvement, when he died, was 30 acres. I think he died before the war. *Thomas Barr* and his wife lived with *Robert M'Dowell*, who left his property to his brothers' and sisters' children, mine and *Thomas Barr's*. I have worked some on the place, and am working some now. I don't recollect when Mrs *Barr* died. I don't know if I raised grain every year, I have four or five years. I heard *Barr* say he would watch until they got out of possession, and he would take it. *Witherson* cleared about four acres. *Wason* had cleared three or four acres. *Thomas Barr* cleared the side joining me; he claimed one half the tract. I am on one of the tracts claimed by *M'Call*. I know the lines around the tract, I carried the chain myself. *Robert M'Dowell* died in the fall of 1800."

James M'Dowell testified that *Thomas Barr* lived on the land about three years after *Robert M'Dowell* died; he was not living on it when it was sold by the sheriff, he had left it two or three years before the sale; it is three years since *Margaret Barr* came on it; grain was raised all except one or two years; there was grain raised two or three years. *Barr* left it about Christmas or new year's; I don't know if he put in a crop or not.

The defendant then gave in evidence a patent to *Robert M'Dowell* for 429 acres and 38 perches, on warrant dated in 1803; also, record of judgment of June term 1797, an ejectment at the suit of *Archibald M'Call* v. *Thomas Barr*, for 400 acres of land in Buffalo township; also transcript of a judgment, *William Wylie* v. *Thomas Barr*, *fi. fa.* June term 1819, on which the right of *Thomas Barr* to his interest in the tract of land in dispute, is levied on; *venditioni exponas* to September term 1819 returned—Sold to *James Monteeth* for 380 dollars. A deed from *Philip Mechling*, Esq. sheriff, to *James Monteeth* for the right, title and interest of *Thomas Barr* in the land in dispute, dated 22d September 1819.

John Cowan, having been sworn, said, "I cannot recollect how long it was that no person resided on the land in dispute, there was one year it was not occupied. We had it for pasture; the fields lay open and the neighbours' cattle run into it."

The court below thus charged the jury:

The plaintiff claims the tract of land in dispute by virtue of an alleged improvement and settlement thereon, commencing in the fall of 1795 by the entry thereon by *William Wason* for the purpose

of acquiring the title under the act of assembly of 1792. It appears a number of logs for a cabin were then cut down by him, and that he returned early in the spring of 1796, had a cabin put up, in which himself with his wife and children resided until harvest time, and in the intermediate time cleared and planted about three quarters of an acre of potatoes. It appears that he then moved into what was then called a settlement, as it may be inferred, to reap his fall grain there; and afterwards returned to the tract in dispute, where, it appears, he was on the 11th of August 1796, the date of a contract between him and *Archibald M'Call*. By this the settler recognized a right in *A. M'Call* to the land under a survey which had been made by the surveyor's deputy, and an acceptance thereof by the surveyor-general, and agreed to purchase 125 acres of the tract for the sum of one penny, and the further consideration of complying with the condition of settlement, improvement and residence required by the act of assembly, so that a patent can be obtained for the whole tract, the purchase of which had been paid by *A. M'Call*. It further appears that *William Wason* agreed to sell his interest in the tract and another adjoining it, the whole containing 250 acres, under his contract with *A. M'Call*, which *Thomas Herron* bound himself to fulfil, and upon which, within six months after, *Wason* was to make a sufficient title to him. Some time after this it would appear the parties went back to the settlement. *Herron*, it appears, returned to the tract the following spring and cleared about two or three acres, planted them with corn, and in the fall sowed them with wheat. How long he resided on the tract afterwards does not distinctly appear, but sometime after put the son of one *Witherson* in possession, who cleared three or four acres more and resided on the tract in the spring of 1798. Some of the witnesses believed seven or eight acres in all had been then cleared. This, considering the general situation of that quarter of the country, then, was a substantial improvement, entitled to respect and consideration.

On the part of the defendant a claim is set up to the land under an improvement, commencing in the spring of 1796, by the raising of a cabin by *Thomas Barr* and *Robert M'Dowell*. It does not appear they did any other work until the spring of 1798; they seem to be fully conusant of the improvement of *Wason*, *Herron* and *Witherson*, and of the contract with *Archibald M'Call*. They afterwards claimed according to the lines of the survey which had been improperly made for him. They would not permit them to be infringed on by any of the neighbouring settlers. It was, therefore, probably an object to acquire whatever *Archibald M'Call* had, and, which was certainly of much greater consequence, *the right of Herron*, under his own and *Wason's* improvement. This seems to have been brought about with considerable address. They take no assignment from *Herron* of his contract with *Wason*, which recognises that which had been entered into with *Archibald M'Call*. They execute a loose note, promising to maintain a settlement when

they had begun there, unless prevented by law. They do not acknowledge any right in *Herron*. What suit could be maintained by *Herron* on such a vague instrument, I am at a loss to conceive. It is very possible that they then claimed adversely to *Herron* and *Wason's* improvement; and if they could persuade *Wason* to give up to them, they proposed claiming under what they called their improvement in the spring of 1796, by raising a cabin, the first that had been raised on the land in question.

They have taken possession of the whole, and carried on their improvements without interruption, or even notice by or on part of *Archibald M'Call*, from 1798 until June 1817, a period of nineteen years. I feel much disposed, however, to get over this strong presumption of abandonment, but on further consideration I am of opinion it cannot be got over. It is strengthened by the trial, brought in 1817, resulting in a verdict and judgment for *Thomas Barr*. The present suit is delayed until March of the last year, which is another instance of great neglect. Independent of these objections to the plaintiff's right of action, I am of opinion that the act of limitation applies to this case, and operates as a bar to the plaintiff's recovery.

Errors assigned.

1. The court erred in rejecting the warrant of acceptance to *Archibald M'Call*, the assignee of the plaintiff for thirteen tracts of land, of which that in dispute is one.

2. The court erred in charging the jury that there was a strong presumption of abandonment by the plaintiff.

3. The court erred in charging the jury that there the act of limitations operated as a bar to the plaintiff's recovery.

White, for plaintiff in error, cited, 3 *Yeates* 289; 6 *Johns.* 34; 14 *Johns.* 224; 16 *Serg. & Rawle* 281; 10 *Serg. & Rawle* 194; 11 *Serg. & Rawle* 340.

W. W. Fetterman, for defendant in error, cited, 1 *Penns. Rep.* 74, 451.

The opinion of the Court was delivered by

Huston, J.—This case differs in its features from any heretofore brought from that portion of this state, which unfortunately has been so productive of lawsuits, and the settlement of which has been so retarded by contests as to settlers.

Among the evils which have arisen from those contests, one, and not the least, is the destruction or perversion of moral principle, which is too often disclosed. Those who have a sense of the obligations of law and of religion, who would shudder at being told they were acting without regard to their duty to their neighbour, and in opposition to the commands of their God: men, who, in every part of their intercourse with society, endeavour to act with scrupulous honesty,

too often seem to think the ties which bind them in all other cases, have no obligatory force in their transactions with respect to the titles to the land on which they live. Different opinions and different decisionsby our supreme court and the supreme court of the United States, for a long time, made it doubtful what, under certain circumstances, was or was not a good title; every individual next formed his own opinion, and with many men, all this resulted in a total disregard to any and every contract made respecting the land. I hope the time is not far distant when the titles will be settled, and the plain rules of law and of moral justice, will again be acknowledged in words and in practice.

The same evil, and something worse, has occurred in other places, and has disappeared; has given way to reflection and a sense of duty and right.

Before I come to the contracts of the parties, I will notice the situation of the plaintiff and his claim, and of the defendant, at the time of the contract by the plaintiff and the defendant. I mean those under whom the plaintiff and defendant claim.

At the date of the act of 3d April 1792, all agreed as to its construction; and this is abundant evidence that those who took warrants were as strongly impressed with the necessity of making the settlement, as those who claimed only by actual settlement. The continuance of Indian hostilities, and the impossibility of procuring forty thousand actual settlers to go into a wilderness within two years, set ingenuity at work to evade the law. And among the strange effects of this, was the arrangement by the officers of the land office, by which they undertook to dispense with the provisions of the law, and to grant patents on what were called prevention certificates; but until the decision of the supreme court in *The Commonwealth* v. *Coxe*, many supposed these titles good.

Not to be behind the warrantees in attempts to evade the law, the settlers, as soon as a few logs were cut, or a few trees deadened, claimed to have as much right as if a house had been built, and a family was residing in it. And as many of these went to that country with the intention of making a *bona fide* settlement according to the law, and were discouraged by the difficulty of procuring provisions in a wilderness, where all wanted to buy food, and nobody had any to sell, it soon happened that many wanted to sell their improvements. Another class, each of whom had commenced more than one settlement, wished to sell all, or all but one. Purchasers were found; for we have seen times when every body would buy land, and times when nobody would buy land, at least, not at a fair price.

The plaintiff seems to have purchased a dozen of these improvements; and as each is from a different person, we may take it, from men who began *bona fide* to settle one tract, but had become discouraged. Although the deputy surveyor ought not to have made a survey for any one who had no warrant until he had made an actual settlement, that is, until, at least, a person was residing thereon as a

[Rush v. Barr.]

home, yet surveys were made as soon as a few days' work had been done, and for men whose residence and family were many miles distant; and on these deadenings, not actual settlements and surveys, the officers of the land office received the purchase money, and warrants of acceptance issued, and perhaps, in some cases, patents. And on the principle of prevention patents to warrantees, this was right; an actual settler might be prevented from completing what he had begun, as well as a warrantee. The warrants of acceptance, which were one step towards a patent, could be no better than a patent; that is, they were in themselves, and unsupported by any thing else, of no avail, and no suit would be supported on them; but did not preclude the owner from showing that he had actually made the settlement according to law. The one in question, was obtained on the 7th of August 1795. The settlement of *J. Clark*, which it recites, had then begun, during the Indian hostilities; and *Clark*, or whoever came under him, would have had two years from *Wayne's* treaty, within which to make it his actual residence, and clear, and fence, and cultivate it, according to law; for in this country, as well as other parts of the state, he who had begun *bona fide*, was not required to stay the day and night, until his family was brought on; if he persevered in his improvement with due and reasonable diligence, he was protected. *M'Call* then came to this country in 1796, or before: he was on this land in 1796, claiming it on *Clark's* improvement, and he found *Wason* there, who also had commenced an improvement, but after *M'Call's* warrant of acceptance, and not within the lines of this tract. An agreement is made between *M'Call* and *Wason*, which recites, that *Clark* had made improvement on this tract, and a survey had been made by the deputy surveyor, and the purchase money paid by *M'Call*, and a warrant of acceptance to him; but that "no patent could issue, until the conditions of settlement, residence and improvement, directed and imposed on the lands, by act of 3d April 1792, shall have been completely performed and fulfilled;" and then goes on to state, "that *M'Call* had that day sold one hundred and twenty-five acres of the land, &c., being part of said survey to *William Wason*, who agrees and binds himself to perform and fulfil the settlement, residence and improvement required by the said act, so that a patent may issue for the whole tract. And then *Wason* binds and obligates himself to do all required by the act of assembly, in the very words of the act.

Now, let us pause and review this transaction. *M'Call* did not come to *Wason* and tell him, I have a good and complete title, and thus induce him to contract; he tells him exactly the truth, for I take it, that the recital, that *Clark* had commenced an improvement, is to be taken as strictly true between those parties at this time. What both parties state in argument to be the state of facts, is as much the statement of one as the other. Whether the work on the ground showed that somebody had been there before *Wason*, we

do not know, but *Wason* might know by inspection; and as he resisted the *Barrs*, would have resisted *M'Call*. But further, if no work had been done by *Clark*, the survey by the deputy surveyor, *Gapin*, for *Clark*, is, after thirty years, evidence of at least work done by *Clark*. All the rest of the statement of what *M'Call* had done, is proved by exhibits in the cause. The copy of the warrant of acceptance offered in evidence, was certified from the surveyor-general's office in May 1796, and was probably then exhibited.

From 1795 until 1796, there was no conclusive proof of abandonment by *Clark*. *M'Call* might then go on and complete the settlement, and had until the 22d of December, 1797, in which to do it. It is distinctly understood and stated, that the title was inceptive, and would not be good unless followed up according to the directions of the act; and in consideration of one hundred and twenty-five acres, *Wason* agrees to do all the act requires, so that a patent may issue for the whole survey. It has been followed up, and the actual settlement made and continued five years, and a patent could have been got on that settlement, and on the money paid by *M'Call;* for although the warrant of acceptance is, I think, informal, yet as he had paid the purchase money for this tract, and had procured the actual settlement to be made within the time, a patent would have regularly issued for the use of *M'Call* and *Wason*, as their vendees, on that payment of money, though informally paid.

I repeat, that if *M'Call* had undertaken to sell a good title, or that he himself would procure a good title, when in fact he had no title, and could not procure one without an actual settlement, the law might on these facts have been, that the settlement made by *Wason* would have enured to his own use, and not for his own and *M'Call's;* but the bargain was very different, and was a lawful one, and ought to bind both parties.

If *M'Call* had not settled or procured some one to settle according to law, his warrant of acceptance and his money paid, would not have availed him; but he did, or procured another to do all the law required, within the time required, and the question, shall that other take all, or shall he be bound by his bargain, and take one hundred and twenty-five acres, leaving the residue for *M'Call*.

On the 17th of August 1796, only a few days after his agreement with *M'Call*, *Wason* conveyed to *Herron*, who bound himself to complete the settlement agreeably to *Wason's* contract with *M'Call*. There is something in this not explained on our paper book, it is a contract to sell two hundred and fifty acres, which he, *Wason*, had bought from *M'Call*; the case furnishes no evidence of his right to that quantity; but probably there was some written or parol agreement which we have not. *Herron* moved his family on next year, we find his nephew *Witherson* on, and three or four acres cleared and cultivated. In 1798, *Thomas Barr* and *Robert M'Dowell* came there—they had begun a cabin in 1796, and been absent two years. They bought from *Herron*, moved on and continued; and here we

[Rush v. Barr.]

meet with what induced the reflections with which I commenced. It is in full proof by parol, that they bought from *Herron*, and were to give him the same piece *Herron* gave *Wason*, and that they gave a note for the balance of the purchase money. When another person wanted to take part of the land, they kept him off by *M'Call's* title, and *Wason* and *Herron's* improvement, which they said they had purchased; but the only written evidence of title was in these words, signed by *M'Dowell* and *Barr*: "be it remembered that we, *Robert M'Dowell* and *Thomas Barr*, do promise and covenant with *Thomas Herron*, to maintain a settlement according to law, where they began their settlement and now lives, unless prevented by law. Witness our hands and seals, 26th May 1798."

The last witness to this paper proved that he was present at the bargain, from begining to end—at the conclusion of which they entered into the above agreement. That he understood from the declarations and conversation of all parties, that *Barr* and *M'Dowell* were to keep *Herron* clear of *M'Call*, and were to continue the settlement *Herron* had bound himself to maintain.

Now, from the words of the above agreement, it would seem, it was their own settlement, commenced in 1796, which they bound themselves to continue.

These persons, in 1803, took a warrant in the name of *Robert M'Dowell* and a patent. *Robert M'Dowell* died in 1810, and left his half to *Barr's* children, and some other nephews of his.

The possession was continued regularly until *M'Dowell's* death, and *Barr* continued on for about three or four years after. *Barr* became indebted, and in 1819, all the right of *Thomas Barr* to his interest in the tract of land, was levied on, and sold to *Monteeth*. *Barr* did not live on it then—he is since dead. When the defendant, his widow, went on it, it does not appear. This suit was brought to March term 1828.

It also was shown that an ejectment was brought in 1817, by *A. M'Call* against *Thomas Barr*, which resulted in judgment for the defendant.

The errors assigned are:

1. The court erred in rejecting the warrant of acceptance which was offered in evidence. At first, I thought the court right in this particular, but a minute examination of the dates and of the several agreements, satisfies me that it ought to have been admitted. It would not have been evidence as a ground of title between parties who never had privity with each other, not against an actual settler who, after the 22d of December 1797, entered on the land as vacant, and adverse to the warrant, unless along with it the defendant had shown some actual settlement connected with it; but it was evidence to shew that the statement of *M'Call* in his agreement with *Wason* was true, and if the defendant had acted fairly, it, or the payment of the purchase money on it, connected with the actual settlement of the defendant would have availed to procure a good title.

The judge was struck, as I have been, by the appearance of iniquity in the attempt of the defendants to get clear of their contract, only he calls it by the softer name of management. If the jury should find that the parol evidence is true as to *Barr* and *M'Dowell* purchasing from *Herron*, and that their agreement was put in its present form with an unfair design, the plaintiff would be entitled to recover an undivided part of the tract, containing in all above one hundred and twenty-five acres—I say, would be, unless the statute of limitations bars him. As to abandonment, I see no evidence of it; the land was in possession of the part owner under a written agreement. It does not appear that any proof of the settlement having been completed was offered to *M'Call*, or any call on him to take out a patent; by the agreement the possession was to remain with *Wason* or those claiming under him. The fact that *Barr* and *M'Dowell* claimed adversely was not of record in the county; in fact if Mr *Ross* believed they did not so claim in 1803 or 1804, the warrant in 1803 to *M'Dowell* was an act inconsistent with the agreement with *M'Call*, but if that warrant called for a settlement made by *M'Dowell*, the reading of it would give no notice that it was for a tract settled first by *Clark* and then *Wason*. The statute of limitations is a most useful one, and ought not lightly to be frittered away; but there are cases to which it does not apply. Whenever the legal title is in one, and the real interest in another, these form but one title, and the statute does not run between them until the trustee disclaims and acts adversely to the *cestui que trust:* so of landlord and tenant; the possession of the tenant is that of the landlord, who reposes safely on the effect of his lease until the tenant refuses to pay rent, disclaims the right of his landlord, and openly sets him at defiance. And so in all cases where two persons have each an interest in a tract of land, of such kind that both their interests form but one title, and by their agreement one is to possess for his own use and the use of the other. In such cases the statute does not run until he in possession disclaims the right and interest of the other—denies his right and refuses possession, and *such disclaimer and denial must be such that the other has notice of it.* It is not sufficient that it is denied secretly, or an agreement inconsistent with it is made and concealed. Fraud prevents the statute from running; it is well settled that the statute does not run until the discovery of the fraud. After the discovery of the facts imputed as fraud, it does run. *Kane* v. *Bloodgood*, 7 *Johns. Chan.* 90, 122, and cases there cited.

By the agreement between *M'Call* and *Wason*, the possession of *Wason* was to be the possession of *M'Call.* The latter could then repose in safety. The possession was to continue so till a certain time after, when a patent was to be obtained, and there was no exact agreement when it was to be divided. *Wason* conveyed to *Herron* in good faith, and the latter covenanted to fulfil the agreement with *M'Call.* Whether *Herron* joined in the plan to defraud *M'Call* of his interest, does not appear, but the defendant, if the witnesses be

believed, had full notice of *M'Call's* interest, and defended under it once when it suited them; at the same time, by agreeing to protect *Herron* against *M'Call*, it would seem a deliberate plan was formed, which was any thing but honest. If the jury, for it must be left to them, believe there was an intention unfairly to drop the contract with *M'Call*, and set up and hold under the merely colourable commencement made by the *Barrs* in 1796, and which had been abandoned two years, their conduct was fraudulent as to *M'Call;* they were, in honesty, in conscience and in law, as much bound to give him his share of the land as *Wason* or *Herron* was, and the statute of limitations does not begin to protect them until *M'Call* knew of this conduct and intention of theirs. The jury will ascertain when *M'Call* had knowledge of this unfair conduct, and if this suit was not commenced until twenty-one years after he had knowledge of these facts, then the statute of limitations bars the plaintiff; if twenty-one years had not expired from the time he had notice of such fraudulent and adverse act, it does not bar the plaintiff. The effect of fraud on the running of the statute of limitations did not occur to the court of common pleas in the hurry of the trial.

Judgment reversed, and a *venire facias de novo* awarded.

Riddle *against* Albert.

Under the act of the 3d of April 1792, taken in connexion with the acts of 22d of April 1794, 22d of September 1794, 2d of April 1802, and 3d of April 1804, if an original warrantee has neglected to commence the settlement, improvement and residence mentioned in the first of these acts, for the space of two years from the date of his warrant, it is lawful for any one to enter and take possession of the land as a settler, for the condition broken on the part of the warrantee, without having first procured a vacating warrant.

Actual improvement and settlement are essential to the right of any one to have a vacating warrant.

Upon such improvement and actual settlement having been made, the actual settler may defend himself against the original warrantee, or recover in ejectment against him.

ERROR to the common pleas of *Butler* county.

This was an action of ejectment for a tract of land, in which *Adam Albert* was plaintiff, and *James Riddle* was defendant.

The plaintiff below claimed under a warrant, dated the 1st of March 1794, in the name of *Robert Elder*, which was said not to be the description of the land in dispute, but a survey was made by the deputy surveyor of the district, embracing the land in dispute, on the 28th of May 1795. This survey was never entered in a book kept by the deputy surveyor, but was returned into the surveyor-general's office before the year 1804, though the time was not shown.

Evidence was given also, on the part of the plaintiff below, on the trial, showing that all right or title which existed under this warrant and survey, to the land in dispute, was then vested in him.

The defendant below claimed the land under an improvement, commenced in the winter of 1798 or 1799, by *John Brown*, by his building a cabin upon it. He, in the spring of 1799, relinquished it in favour of *Andrew Gillilard*, who moved upon the land at that time, with his family, making it the place of their abode and residence, and, at the same time, clearing, fencing, cultivating and raising grain thereon, and continuing to do so every year, until 1809, when he had about twenty acres cleared and fenced, upon which he had raised grain. At this time he sold about one hundred acres of the land to *George Shannon;* and continued to occupy the residue of it by tenants, to whom he leased it from time to time, by their residing upon it, and cultivating and raising grain upon it every succeeding year, with the exception of one year (about which the testimony of the respective parties was somewhat conflicting and contradictory), until the bringing of this action, which was in 1823. *Shannon* sold this one hundred acres to the plaintiff below, who afterwards bought the warrant of 1794.

Andrew Gillilard, after having gotten a certificate from the deputy surveyor of the district in which the land lay that it was not appropriated under any warrant issued from the land office, obtained a warrant for it, on the 25th of March 1818 ; and on the 18th of May following, a patent for it was granted to him. The defendant below, *James Riddle*, was the tenant of *Andrew Gillilard*, in the possession of the land at the time this action was commenced.

It was testified by some of the witnesses, and perhaps contradicted by none, that *Mary O'Hara*, who was living upon the land as a tenant under *Andrew Gillilard*, left it some time in the spring of 1818, and that the house remained unoccupied during the summer of that year ; but some of the witnesses on the part of the defendant below testified, that the land was cropped by *Riddle*, as the tenant of *Gillilard*, and that he raised a crop of buckwheat upon it ; while some of the witnesses on the part of the plaintiff below said, they had been on the land during that summer and fall following, passing through it occasionally, and occasionally passing by in sight of it, and could not recollect that they saw any grain, buckwheat or any other, raised on it that year—rather thought there was none. This was the only year in which it was denied that the land was not occupied and grain raised upon it by either *Gillilard* or his tenants. There was also some evidence given on the part of the plaintiff below, that he had, in the course of this year, entered upon the land, thrown down the back wall in a cabin and erected a chimney in it, that stood upon the land, and that he, at the time of doing so, said that he came in under his claim under the warrant of 1794, that he intended to rent the land, and after fastening up the door left it again.

This statement contains, substantially, all the facts disclosed and

evidence given upon the trial of the cause, which are in any way material to the final determination of the real matter in controversy between the parties.

The following errors were assigned.

1. That the court erred: in admitting in evidence the certificate of the land office.

2. In admitting in evidence the record of the judgment and subsequent proceedings in the case of *Pigon* v. *Adlum, Nichols et al.*

3. That the court erred: in charging the jury, that it is unnecessary for a warrantee to show that he made such settlement, improvement and residence as is required by the act of 1792, and within the specified time; provided a person has settled without a vacating warrant, and made such settlement and improvement; because such settlement and improvement enure to the warrantee; and that a trespasser cannot take advantage of any forfeiture of the warrantee, under the act of 1792.

4. In charging the jury, that the act of the 14th of March 1816 is unconstitutional, and void.

5. In charging the jury, that the purchase of the one hundred acres will not bar the recovery of the remainder of the tract.

6. In charging the jury, that an actual settler cannot recover without a vacating warrant.

7. In charging the jury, with regard to what constitutes such an entry as defeats the operation of the act of limitation, and in relation to the entry of *Adam Albert.*

8. [Omitted, as not decided upon.]

W. W. Fetterman, for plaintiff in error, cited, *Skeen* v. *Pearce*, 7 *Serg. & Rawle* 303; *Hazard* v. *Lowry*, 1 *Binn.* 166; *Patterson* v. *Cochran*, 1 *Binn.* 231; *Wright* v. *M'Kechan*, 3 *Yeates* 280; *Dawson* v. *Digby*, 5 *Binn.* 204; *Wright* v. *Small*, 4 *Yeates* 562; *Young* v. *Beatty*, 1 *Serg. & Rawle* 74.

Evans and *Ayres*, for defendant in error, cited, 2 *Yeates* 450; *Young* v. *Beatty*, 1 *Serg. & Rawle* 74; *Bedford* v. *Shelby*, 4 *Serg. & Rawle* 401; 10 *Serg. & Rawle* 97.

Wilkins, in reply, for plaintiff in error.

The opinion of the Court was delivered by

KENNEDY, J.—Eight errors have been assigned in this case. The first and second, which are founded upon bills of exception taken to the opinion of the court below in regard to the admission of evidence, were very properly abandoned by the counsel for the plaintiff in error. The remaining six are to the charge of the court which was delivered to the jury.

It is sufficient to say that there is no error in that part of the charge which is made the ground of the fifth error.

As to the fourth, seventh and eighth, it does not appear to me

that they are necessarily involved in the cause, and certainly not necessary to be decided on, in order to make a final end of the dispute in this cause; and unless it were necessary for this purpose, the press of business upon this court will not admit of bestowing that consideration upon the questions growing out of them, that might be requisite to solve them correctly. I shall, therefore, pass them by without intimating any opinion in respect to them.

The land in dispute is a part of the land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, for the granting of which the act of the 3d of April 1792 was passed by the legislature of this state.

The third and sixth errors turn upon the same principle, and will be disposed of together. In them the plaintiff in error complains that the court below erred in charging the jury, among other things, that a warrantee under the act of the 3d of April 1792, without showing that he had ever made or caused to be made a settlement, improvement and residence upon the land, or ever having attempted it within the time allowed by law to him for that purpose, had a right to recover the possession of the land from an actual settler, where he settled upon and took his possession of the land without obtaining a vacating warrant; that the commonwealth alone could raise this objection, and take advantage of the condition broken, by not making the settlement within due time, which was to be done by granting a vacating warrant; that the settler, not having obtained a vacating warrant from the commonwealth, was to be considered a mere trespasser, and his settlement, improvement and residence as enuring to the use and benefit of the warrantee; and that such settler, being a trespasser, can not take advantage of his wrong, nor can a settler recover or defend as against the warrantee, without producing a vacating warrant.

The same question which is here presented by this part of the charge of the court to the jury, has been determined and settled during this term in *Campbell* v. *Galbreath*, which was brought here by writ of error to the judges of the court of common pleas of Mercer county. This court has there decided that under the act of the 3d of April 1792, taken in connection with the acts of the 22d of April 1794, 22d of September of the same year, 2d of April 1802, and 3d of April 1804, if the original warrantee has neglected to commence or cause to be commenced, the settlement, improvement and residence mentioned in the first of these acts for the space of two years from the date of his warrant, unless in case of his death, when the settlement or further prosecution of it seems to be dispensed with by the terms of this act, or has been prevented by force of arms of the enemies of the United States, but shall have failed within two years next after the cause of such prevention ceased to exist to commence or resume his settlement, improvement and residence upon the land, according to the requisitions of the same act, that it is perfectly lawful for any person to enter upon and take possession of the land as a settler, for the condition broken on the part of the warrantee in not

having commenced and persisted in his settlement until it was completed. And so far from a vacating warrant being necessary in order to justify any one in taking possession of the land for the purpose of settling upon and improving it according to the directions of the act of 1792, where the original warrantee has failed to do it or to have it done within the time required, that the person wishing to take advantage of the forfeiture, must first enter upon the land and make the settlement, before he can apply and obtain a vacating warrant. The acts of assembly referred to have expressly forbidden the issuing of a vacating warrant to any one, unless he has previously made an improvement and become an actual settler upon the land; and therefore, by irresistible inference, have made the entry of any one for such purpose altogether lawful, and put it in his power to take advantage of the condition broken; so that instead of the commonwealth being the first to act and move in the matter, as has been said and even decided heretofore, it belongs to the citizens individually to do so, by entering upon and settling the land. It also follows of course, that if the entry of such settler previously, be not only lawful, but indispensably necessary, in order to obtain a vacating warrant, that all claim and title to the land by the original warrantee must cease, and be entirely defeated immediately upon the settler's taking possession of the land and making his settlement. The settler thereby acquires a pre-emption right to the land, which will enable him not only to defend his possession of it against the original warrantee or any other, but to recover it by action if expelled by him. It is unnecessary to go into a minute investigation of this matter, and to refer to the various clauses and provisions contained in the several acts of assembly referred to on this subject, in order to sustain the propositions which I have advanced, for that is done pretty much at large, in *Campbell* v. *Galbreath*, which will appear in print at the same time with this case.

The original warrant, which was granted to *Andrew Gillilard* in March 1818, though not in the form of a vacating warrant, may be considered sufficient, under the circumstances of this case, to supply the place of one. *Gillilard* had done all that was required towards settling, improving and residing on the land, nay, much more than is required either by the act of the 3d of April 1792, or by all the acts together. He paid the purchase with interest, from the date of his first settlement on the land, to the state. In short, he has done every thing towards paying the purchase money with interest, and performing all other terms and conditions required by law, to entitle him to a vacating warrant and patent for the land. Even the fees have been paid by him. Beside it is not his fault, if there be any in it, that he did not obtain a vacating warrant instead of an original warrant. He did all that was required by the act of the 3d of April, to inform himself whether the land had been appropriated by a survey under an original warrant or not; but no survey was entered in the deputy surveyor's office, nor book kept for that purpose in it, as required by the act. He then obtained a certificate in

due form, from the deputy surveyor of the proper district, that the land never had been appropriated by warrant or survey under a warrant, and, of course, this appearing to be the case, it was impossible for him to obtain at the land office any other form of warrant than the one he did. It cannot be that *Gillilard* can be prejudiced by the neglect of the agent of the commonwealth, in not keeping a book and entering in it all the surveys made, when no possible injury has been done by it to the warrantee. I am of opinion that *Gillilard's* title to the land is as perfect and absolute as if he had obtained his patent upon a vacating warrant and survey.

Before closing, it is due, however, to the learned judge of the court below, who delivered the charge to the jury, that although there was error in that part of it which has been noticed under the third and sixth errors, yet he is not properly the author of it; that it was produced by his sense of judicial obligation, which bound him to regard the decision of this court given in the case of *Skeen* v. *Pearce*, 7 *Serg. & Rawle* 303, as the law of the state, contrary to what seems to have been his own opinion upon the question. As it was the court of *dernier* resort that fell first into this, he left it very properly for the same to correct, which I now consider as done.

The judgment in this case is reversed and a *venire facias de novo* awarded.

Beltzhoover *against* The Commonwealth.

In an action of debt against two or more, a confession of judgment by one defendant, accepted by the plaintiff, operates as a release of all the other defendants, against whom no judgment can afterwards be obtained in that action or any other upon the same evidence of debt: and whether that evidence of debt be a joint, or a joint and several obligation does not alter the rule.

In a joint action against two or more, a rule of reference cannot be taken as to one of the defendants, nor any less number than the whole, and must be served on all.

ALLEGHANY county.

This was an action by the *Commonwealth* at the instance of *Hezekiah Niles* against *Lazarus Stewart*, late sheriff, *Alexander Hild*, *John Turner* and *Henry Beltzhoover*, upon the official bond of *Stewart*. The writ was served on all the defendants, and all appeared by counsel. *Lazarus Stewart*, one of the defendants, confessed a judgment on the docket for 117 dollars and 59 cents in the presence of the plaintiff's attorney; after which the plaintiff entered a rule to refer the cause to arbitrators, who subsequently made a report, finding for the plaintiff, against *Henry Betzhoover*, one of the defendants, 117 dollars and 49 cents; upon which judgment was entered, and to reverse which, this writ of error was sued out.

[Beltzhoover v. The Commonwealth.]

W. W. Fetterman, for plaintiff in error, cited, *Marshall* v. *Lowe*, 6 *Serg. & Rawle* 281; *Garber* v. *Fisher*, 5 *Serg. & Rawle* 179; *Taylor* v. *Fitzsimmons*, 17 *Serg. & Rawle* 453; *Pedan* v. *Cox*, 3 *Serg. & Rawle* 245; *Smith* v. *Black*, 9 *Serg. & Rawle* 142.

Selden, for the defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—I consider the case of *Williams et al.* v. *M'Fall and others*, 2 *Serg. & Rawle* 280, as ruling this case. That was an action of *assumpsit* against two upon a joint contract, in which one of the defendants appeared and confessed a judgment for a certain sum of money, but the other pleaded the general issue, and went on to trial. A verdict was found against him for a smaller sum, and it was held that no judgment could be entered on the verdict. The claim was joint, and the plaintiff, having taken a final and separate judgment against one of them, thereby severed the nature of the demand and released the other. The judgment confessed became his only security. His claim originally being joint, and having commenced a joint suit, he could not charge them severally without their consent. The judgment in an action founded upon a contract must follow the nature of the claim; it must be joint also. The circumstance of the bond upon which this suit is founded being several as well as joint, is not to be regarded, and does not vary the case; because, although it be so, the plaintiff below had his election to have sued the defendants there either jointly or severally, but having made his election to sue them jointly, he is bound by it, and the bond must be considered as if it were joint merely and not several, and the action, as if it had been brought upon a joint bond only; and the defendants are entitled to all the chances of escape that would have attended a proceeding upon a mere joint original liability. If the plaintiff below had proceeded in his suit and obtained a joint judgment against all the defendants, and *Henry Beltzhoover* and the other sureties had died before execution of it, without leaving any real estate bound by it; and *Lazarus Stewart*, the principal defendant, still being alive: the judgment would have survived entirely against him, and in no event would it be levied out of the estate of the deceased defendants. If, however, the plaintiff below had sued them severally, it would be otherwise, for the estate of each and all would continue to be liable until satisfied. So that to permit the plaintiff below, after having brought a joint suit, to proceed in it against them severally, would not only be setting aside the distinction which is well known to exist in law between a joint and several suit, but it would be suffering him to change the nature of his claim entirely, into a several from a joint one, for which he commenced his suit, and consequently to change the nature of the liability of the defendants in the suit, without their consent. By taking a judgment against *L. Stewart* alone, the plaintiff below has precluded himself for ever from proceeding again upon the same bond for the

same cause of action, in either a joint or several action against *Stewart*, and demanding or obtaining another judgment. His right of action for the same cause, is merged in the judgment already confessed, and has put an end to the action as regards *Stewart*. But having commenced his action jointly against *Stewart* and the other defendants below, he has no right to demand a judgment against the latter, without including *Stewart*. He however has already got one against *Stewart*, and therefore cannot have another for the same cause. Hence it is manifest that he must be content now with his judgment which he has against *Stewart* as his only security, and the judgment against *Henry Beltzhoover* is erroneous for the reasons already mentioned.

It is also bad for the second error assigned; for it was not competent for the plaintiff below to bring a joint suit against the four, and after the writ was served upon them, and they had all appeared by attorney, to proceed either in court or by reference under the compulsory arbitration law against any one, or less number than the whole of the defendants, as long as they continued all in being, so as to obtain a final judgment, unless one or more of them should consent to give such judgment; which, I have already shown, would be good against those who gave it, but would also have the effect of releasing or discharging the others. To sanction such a course of proceeding, except against those who have assented to it, would, in effect, be to permit him to enter a *nolle prosequi* against such as he did not choose to have the rule for arbitration served on, which cannot be done in actions founded upon contract, unless where one or more of the defendants admit their joint liability to have existed, but claim to be discharged from it by operation of law, and plead to that effect. Besides, it has been well settled by several decisions of this court, that in an action against two or more, the rule of reference, if entered by the plaintiff, must be sued on all the defendants; and that the plaintiff cannot, at pleasure, drop one or more and proceed against the others. See *Marshall* v. *Lowry*, 6 *Serg. & Rawle* 281; *Pedan* v. *Cox*, 3 *Serg. & Rawle* 245; *Brentz* v. *Bishop*, 5 *Serg. & Rawle* 179; *Rank* v. *Becker*, 12 *Serg. & Rawle* 412.

As to the third error assigned, it is sufficient to say that the difference in the amount of the judgment confessed by *Stewart*, and that obtained by arbitration against *Beltzhoover*, is not considered material. The error does not consist in that. Had the arbitrators made an award for precisely the same sum of money with the amount of the judgment confessed, still it could not have been supported, for the reasons already stated in discussing the first error. The plaintiff below, by having accepted of judgment from *Stewart*, one of the defendants, which is completely final, has thereby obtained the end of his suit, and precluded himself from afterwards proceeding against the others; for a plaintiff cannot have two or more final judgments in the same action, founded upon a contract,

whether it be a joint or several action, unless it be by a statutory provision, which does not exist in this case.

The judgment against *Lazarus Stewart* is affirmed, but the judgment and award against *Henry Beltzhoover* is reversed.

Judgment reversed.

Franklin *against* Wray.

Upon an appeal from the judgment of a justice, by the defendant, the plaintiff recovered, in court, less than before the justice, the defendant having given new evidence. Held: that each party should pay their own costs, which accrued subsequently to the appeal, and that the defendant should pay the costs which accrued before the justice.

ERROR to the common pleas of *Alleghany* county.

James Wray sued *William Franklin* before a justice of the peace, who rendered a judgment for the plaintiff for 16 dollars and 50 cents, from which the defendant appealed to the common pleas, where the cause was arbitrated; the defendant gave evidence which he had not given to the justice, and the plaintiff obtained an award for 18 cents and costs of suit. To reverse the judgment as to costs, this writ of error was sued out.

W. W. Fetterman, for plaintiff in error, cited, *Grace* v. *Altemus*, 15 *Serg. & Rawle* 133; *Kemble* v. *Saunders*, 10 *Serg. & Rawle* 193; *Downs* v. *Lewis*, 13 *Serg. & Rawle* 198.

Hamilton, for defendant in error.

The opinion of the Court was delivered by

Kennedy, J.—This suit was commenced by the defendant in error, before a justice of the peace of Alleghany county, who gave a judgment in his favour for 16 dollars and 50 cents, and the costs of suit, against the plaintiff in error, who appealed to the court of common pleas; where the defendant in error entered a rule of arbitration, and obtained a report in his favour for 18 and 3-4ths cents only, and the costs of suit. Under this award all the costs, as well those incurred on the appeal as those which accrued before the justice, were taxed against the plaintiff in error, and this is the error complained of.

It has been admitted that in this case new evidence was given by the plaintiff in error, on the trial of the cause upon the appeal, which was not exhibited on the trial before the justice. This makes the case similar, in every respect, to *Grace* v. *Altemus*, 15 *Serg. & Rawle*

133; and *Kemble* v. *Saunders*, 10 *Serg. & Rawle* 193: where it was decided by this court, that the plaintiff before the justice was entitled to recover from the defendant his costs which accrued before the justice, but that each party must pay his own costs on the appeal. And so in the case of *Downs* v. *Lewis*, 13 *Serg. & Rawle* 198, the same principle is recognised; and said, that if the defendant before the justice had given no new testimony on the trial upon the appeal, that he would have been entitled to have recovered full costs; and the award of the arbitrators, which allowed costs to the plaintiff before the justice in that case, was therefore reversed as to them.

The arbitrators in the present case were, therefore, wrong, in awarding costs to the plaintiff below, after having reduced by their award the amount of the judgment of the justice. As to the costs on the appeal, the award of the arbitrators and the judgment of the court below are reversed, and ordered that each party pay his own costs, accruing subsequently to judgment of the justice, and that the plaintiff in error pay the costs on the proceedings before the justice.

Dunham *against* Kinnear.

A party defendant cannot disaffirm an act of the plaintiff, as being fraudulent and void, and at the same time predicate a claim, as matter of defence, upon it.

In an action for hire, a contract of hire must be proved; proof of a loan of the property will not support the action.

ERROR to *Warren* county.

This was an action of assumpsit, brought by the defendant in error, against the plaintiff in error, in the court below. The declaration contained two counts, one for the price of a wagon sold and delivered, and the other for the hire of a wagon. The facts from the evidence appeared to be, that *Kinnear* was indebted to *Dunham*, and agreed to deliver him a wagon, at a certain price, which exceeded considerably the amount of the debt owing by *Kinnear* to *Dunham*. The debt was to be deducted out of the price of the wagon. The wagon was brought to *Dunham*, when the parties settled and adjusted their accounts, which had arisen between them anterior to that date, but disagreeing about the time at which *Dunham* should pay to *Kinnear* the balance of the price of the wagon, after deducting the balance which was coming to *Dunham*; on the settlement of their accounts, they agreed to record the contract for the sale of the wagon, and that *Kinnear* should give *Dunham* his note for the payment of this balance, three days after that date with interest, which was accordingly given. The wagon, by agreement between them at the same time, was left in the possession of *Dun-*

ham upon loan for a short time. A few weeks afterwards, *Kinnear* sent for the wagon, but, being abroad on use, it was not obtained. Shortly after this, *Kinnear* sold it to a third person, to whom he gave an order upon *Dunham* for it. The order was presented to *Dunham*, but he refused to deliver the wagon, saying that he would not give it up to either him or *Kinnear*, until he was paid the debt which *Kinnear* owed him. *Kinnear* then demanded the wagon in person himself, but *Dunham* still refused to let him have it, until he paid the debt. *Kinnear* told him that he would make him pay hire for every day he detained it. After this, *Dunham* sent the wagon into Warren county, in which *Kinnear* resided, as he said, for a load of shingles. It, however, was left there, and *Dunham*, shortly afterwards, went to the place where it was left, and removed it some distance off into the woods, to prevent *Kinnear* from finding it, as he alleged. A certain *Alexander Thompson* had a judgment against *Kinnear*, before *Samuel M'Gee*, a justice of Warren county, amounting with interest and costs to about 15 dollars. *M'Gee*, the justice, sent word to *Thompson* to direct an execution to be issued, or he thought he would lose his money. About this time *Dunham* came to the house of *Thompson*, and said, as *Thompson* understood him, that he was going to *Kinnear's* for money. *Thompson* told *Dunham* of his judgment againt *Kinnear*, and said he would write to have an execution issued upon it; *Dunham* then agreed to buy the judgment of *Thompson*, who gave *Dunham* an authority to issue the execution, and a receipt for the amount of the judgment, upon *Dunham's* promise to pay it. *Dunham* did not disclose to *Thompson* any thing about the wagon.

After this, *Dunham* caused an execution to be sued out upon the judgment, which he put into the hands of a constable, whom he took to the wagon, about ten miles from *Kinnear's* residence, and directed him to levy upon it, as *Kinnear's* property. The constable, after being indemnified by *Dunham*, did so. He then advertised the wagon for sale, as required by law, and sold it to *Dunham*, for 21 dollars, he being the highest bidder. *Dunham* produced *Thompson's* receipt for the debt and interest due on the judgment, and after deducting the amount of it from the amount of sale, paid the difference to the constable, and the amount of the debt and interest he paid to *Thompson*.

Kinnear's note to *Dunham* was given on the 17th of October 1828, for the payment of 18 dollars and 20 cents, three days after that date with interest: and at the same time the wagon was loaned by *Kinnear* to *Dunham*. The wagon was sold by the constable on the 14th of January following, and was proved to be worth 45 dollars; and that the usual hire given for such a wagon was 50 cents per day.

It was also proved that *Dunham* said at different times to different persons that *he would pay Kinnear whatever the wagon was fairly worth*, if he would call and *settle with him*, notwithstanding the sale

by the constable. This proof was made on the part of *Kinnear*, the defendant in error.

Upon this state of facts the court below charged the jury, that "the plaintiff's claim was for the hire of a wagon, and for the price and value of the same wagon. The defendant, in defence, showed he bought the same at constable's sale, under an execution, at the suit of *A. Thompson:* and one question raised, for the decision of the jury, is, Was that sale and purchase by the defendant fraudulent. *If the jury should be satisfied that it was an actual fraud, practised by the unfair management of defendant on the plaintiff, it is void; and if so, the money which the defendant paid to the constable or A. Thompson, is not to be taken into consideration as a set-off, as claimed by defendant.* Defendant has also shown a note of 18 dollars and 20 cents against plaintiff, and this being undisputed, is allowed as a credit to defendant. But plaintiff claims 50 cents a day for the hire of a wagon from the time defendant obtained it from plaintiff on the 16th of October 1828, until the sale of it on the 20th of January 1829; and also the value of the wagon at the time of sale. For the jury to allow both would be unreasonable; as it would allow plaintiff to claim for the same wagon so largely beyond its value. Although 50 cents a day might be a fair rate of hire per day for a few days or a week, yet it would seem unreasonable for plaintiff to claim that rate per day, if he claim for several months. No man hires a wagon at that rate per day to keep it for months. *I do not say that plaintiff may not recover for a short period in addition to the value of the wagon.* The subject of the sale of the wagon by the constable, in Warren county, by defendant's procurement, when it had been left in his possession in Crawford county, and all the various circumstances, are before the jury for their decision; whether it is *an actual fraud and a void sale, and if so,* they will *judge on the proof what ought to be allowed for the wagon after making the deduction of the note in evidence.*"

After the delivery of this charge to the jury, they returned a verdict in favour of the plaintiff below for 58 dollars damages, besides costs of suit; upon which the court rendered a judgment.

The errors in the charge of the court below are, that the court told the jury that if they should believe that the plaintiff in error was guilty of an actual fraud in procuring a sale to be made of the wagon by the constable, that the sale was void, and that they ought not to allow him as a set-off the money that he paid to *Thompson* for the judgment against the defendant in error, nor yet the money that was paid to the constable.

Again, that although the court below told the jury that "no man hired a wagon at the rate of 50 cents a day for months," yet the president of the court qualified it by saying, "I do not say that plaintiff may not recover for a short period in addition to the value of the wagon."

Pearson, for plaintiff in error.

[Dunham v. Kinnear.]

Galbreath, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—It must be recollected that the plaintiff below founded his claims against the defendant exclusively upon contracts or agreements made between them. First, upon a contract by which the plaintiff below, as he alleged, sold and delivered a wagon to the defendant. And secondly, upon a contract by which he hired his wagon to the defendant at 50 cents per day.

As to the sale of the wagon, it appeared from the evidence that it had been the property of the plaintiff below, without dispute, and that after the sale made of it by the constable, that the defendant below had said and repeated at different times to different persons, "that he would pay *Kinnear*, the plaintiff below, whatever the wagon was fairly worth, *if he would call and settle with him, notwithstanding the sale by the constable.*" It was not pretended that there was any other promise made by *Dunham* to pay *Kinnear* for the wagon; and of course nothing beside this upon which he could support or claim any thing under the first count in his declaration for the sale and delivery of the wagon. But this was not an absolute unconditional promise of *Dunham* to pay *Kinnear* what the wagon was fairly worth. He promised to do so only upon condition "*if he would call and settle with him.*" Now it does not appear that *Dunham* had any claim against *Kinnear* but the amount of the note, and the money which he had paid for *Thompson's* judgment, and to the constable, upon the sale of the wagon made under that judgment. When we refer to those things, as disclosed by the evidence given on the trial which had taken place between these parties, it is difficult to put any other construction upon the promise of *Dunham* as proved, than that he would allow and pay to *Kinnear* a fair price for the wagon, *if he would settle, and let the amount of the note and the amount of the money which Dunham had paid for him on account of Thompson's judgment, be deducted out of the price of the wagon.* Why should *Dunham* have qualified his promise by saying "*if he would call and settle with him.*" These words cannot be considered as having been superadded without any meaning on the part of *Dunham.* It seems to be admitted that he must have had an allusion to the amount of the note; but why allude to the note more than to the money which he had paid on account of *Thompson's* judgment; for he never seems to have intimated that he did not consider himself justly entitled to the last as well as the first, or that he was willing to relinquish it. *Dunham* had a right, and the power to qualify his promise as he pleased; and upon the other hand, *Kinnear* was at liberty to accept of it or not, as he pleased. He had no power to make it binding upon *Dunham* beyond what, or otherwise than as, he intended. Whether such was the meaning and intention of *Dunham* in making his promise to *Kinnear*, as I have suggested, ought to have been submitted by the court below in their charge to the jury, to be de-

cided by them as a matter of fact, and if they should find that such was *Dunham's* intention and understanding of his promise at the time he made it, to have told them, as matter of law, that they were bound to set a *fair price, according to the evidence*, upon the wagon, and to deduct from that the amount of the note, and the amount of the money paid on account of *Thompson's* judgment and the execution upon it; and if these two last sums should fall short of a fair price for the wagon, to return a verdict in favour of *Kinnear* for the difference; or if they should exceed the price of the wagon, to return a verdict in favour of *Dunham* for the excess, whatever it might be.

But under another view of this part of the charge, there was clearly error in it. Whether *Dunham* was guilty of a fraud or not in procuring a sale to be made of the wagon under *Thompson's* judgment, he had an undoubted and just right to be paid the amount of it by *Kinnear*, if *Kinnear* took advantage of such fraud, in case it had been commited, and upon that ground set the constable's sale aside, and insisted upon having his wagon returned to him or being paid full price for it: *Kinnear* can not be permitted to blow hot and cold with the same breath; that is to say, that the sale of the wagon by the constable as *his property* shall be *good* to satisfy and extinguish the judgment of *Thompson* that was assigned to *Dunham*, but at the same time *void*, that he may recover a full price for it from *Dunham* and put it into his pocket. If he then annuls the sale for the fraud practised, as is alleged by *Dunham*, the judgment must be considered as standing in full force and in no wise satisfied, and *Kinnear* bound to pay or satisfy it to *Dunham*, who bought it, as he had an unquestionable right to do, of *Thompson*, the plaintiff in it. Hence it would follow, that *Dunham*, in case of *Kinnear's* avoiding the sale, would have a right to issue a new execution upon the judgment, in order to obtain satisfaction of it, or to set off the amount of it in this action at his election. The surplus money which he paid to the constable beyond satisfying all the costs, he would be entitled to receive back from the constable or justice, or whoever may have it, unless *Kinnear* himself has received it, and in that case *Dunham* would be entitled to defalk in this action, not only the debt and interest, but all the costs, excepting the costs of sale incurred upon the judgment, together with the surplus money paid to the constable. If the sale of the constable be fraudulent and void, and was brought about by *Dunham*, he ought to pay the costs of the sale out of his own pocket, but to lose no more.

In what the court below said to the jury on the subject of hiring the wagon, there was palpable error, because there is not a tittle of testimony to support the count laid in the declaration for that claim, or going to show that there ever was any agreement or contract for hiring the wagon by *Dunham* of *Kinnear*. The only evidence of contract given by which *Dunham* was to have the use of the wagon, was a loan, which is quite the opposite of hiring, and must be so understood by every one. But the president told the jury, " I do not

say that the plaintiff may not recover for a short period, in addition to the value of the wagon." This was in effect telling the jury that "if they thought proper, they might allow the plaintiff below a hire of 50 cents per day for a short period." And it would seem, from the amount of the verdict, that they did do so. The full value or price of the wagon, according to the evidence, was 45 dollars, and beyond this, with its interest up to the time of trial, in an action of assumpsit, or even in trover, the jury had no right to go in assessing the damages. Adding interest then to the 45 dollars up to the time of trial, would have brought the price of the wagon to nearly 50 dollars; from which, according to the direction of the court, the note of 18 dollars and 20 cents, with its interest, which was 20 dollars, was to be deducted, which would have left a balance of 30 dollars: but the jury gave a verdict for 58 dollars, nearly double 30 dollars. Here are 28 dollars added by the jury for the hire of the wagon. There being no evidence of contract for the hire of the wagon, the court erred in directing them that they might allow any thing on that count in the declaration for the plaintiff below.

Judgment reversed, and a *venire facias de novo* awarded.

Stewart *against* Stocker.

When money is made by the sheriff, and brought into court for appropriation, and facts are disputed, it is competent for the court to direct an issue in which the truth of those facts may be ascertained by a jury, and such issue may be put into any form by which the object may be more readily attained.

A mortgage or judgment may be given to secure a creditor for a debt due, for responsibilities which are contingent, or for future advances.

The validity of an execution, like that of a judgment, cannot be inquired into collaterally.

A defendant in an execution, the proceeds of whose property is in court for appropriation, may be examined as a witness on the trial of a feigned issue, to ascertain facts in relation to it, his interest, as regards the plaintiff and the defendant in such issue, being equal.

ERROR to the common pleas of *Alleghany* county.

This was a feigned issue, directed by the common pleas to ascertain certain facts respecting the appropriation of the proceeds of the sale of the property of *Bosler & Co.*, in which *John C. Stocker* was plaintiff, and *Lazarus Stewart*, sheriff, was defendant. The facts which gave rise to the questions decided are fully stated in the opinion of the court.

Ross and *Forward*, for plaintiff in error.

Selden, for defendant in error.

[Stewart v. Stocker.]

The opinion of the court was delivered by

Huston, J.—This was a feigned issue directed by the court below, and subsequently modified by direction of the court, and, as it would seem, with the consent of all parties. It happens sometimes that in certain proceedings before a court, on motion, or otherwise, certain facts are contested, and either no full evidence, or contradictory evidence is given. It is usual in such cases to form an issue, in order to ascertain the facts, and this mode is directed in some cases by act of assembly.

As the object is to ascertain some fact or facts, the issue is moulded so as to answer this purpose. The usual mode is to join issue on a wager, in which one party asserts a fact or facts to be in a certain way, and the other denies; but it is not necessary that this form should be always pursued. In this case the form adopted would seem to have been intended, and certainly is calculated to try the facts and law both, and, in truth, did so, although this would seem to be more than was originally intended, and perhaps more than is usual in such cases. This has been objected to here, and much insisted on; but as no objection seems to have been made on this ground until after the verdict and judgment, I could not listen to it in this stage of the proceedings, except in a very peculiar case indeed; as where the object for which the issue was directed was lost sight of in forming the issue, or in the course of proceeding in it. The court who directed such issue, when it is tried before themselves, can and ought to mould it into the form calculated to answer the end proposed; and if it is found this has not been done, may arrest the proceedings and begin anew; but if no objection is made until the conclusion of the trial, neither that court nor this (for we take writs of error to proceedings in a feigned issue in this state) ought to reverse for what was not objected to, and, of course, not decided by the court below, unless it is rendered absolutely necessary to reach the whole of the case.

Some facts and dates are necessary to understand this case. In the spring of 1823, *Anthony Bulin* and *Henry C. Bosler*, trading under the firm of *Bosler & Co.* found themselves greatly involved. After making some arrangements in favour of one or two persons, with which we have nothing to do, they, on the 23d April 1823, gave their bond, with a warrant, to confess judgment, and no stay of execution stipulated for, in the sum of 10,900 dollars, to the *Bank of Pittsburgh;* conditioned to pay the sum of 5455 dollars, with interest from this date, being the amount of the following eight notes; the first seven being drawn by *Bosler & Co.*, and the last by *Henry C. Bosler*, discounted in the *Bank of Pittsburgh;* all payable at sixty days from their date. 1st dated March 5th, 1823, indorsed by *M. Neville*, for 425 dollars; 2d dated March 5th, 1823, indorsed by *George Poe, Jun.*, for 425 dollars; 3d dated March 19th, 1823, indorsed by *J. W. Biddle & Co.*, for 900 dollars; 4th dated April 7th, 1823, indorsed by *James R. Butler*, for 675 dollars; 5th dated April

9th, 1823, indorsed by *J. W. Biddle & Co.*, for 500 dollars; 6th dated April 9th, 1823, indorsed by *O. Orsmby*, for 1100 dollars; 7th dated April 23d, 1823, indorsed by *J. W. Biddle & Co.* and *George Poe, Jun.*, for 1280 dollars; 8th, and last, dated March 12th, 1823, indorsed by *William Hill*, for 150 dollars: and well and truly pay all notes given to renew said notes, and each and every of them; and shall well and truly pay off said notes as required, and save harmless and indemnify said *Bank of Pittsburgh*, in every respect, with regard to said notes, without any fraud or further delay, then this obligation to be void, otherwise to be and remain in full force and virtue.

This judgment was entered at the instance and on the repeated application of Mr *Poe*, who was the indorser on two of the notes, amounting to about 1700 dollars.

Bosler and *Bulin* were indebted to the plaintiff, *Stocker* and others, on notes or bonds; for these *Poe* was attorney in fact and agent; this I shall not examine, as it is acknowledged he was attorney in fact and agent; and he had instituted suits on all these claims; and under our act of assembly, they were referred to arbitrators, who were to meet on the 27th of May 1823, and whose award would operate as a lien on the lands of *Bosler* and *Bulin*, from the time it was filed, though no executions could be issued on such awards, until after twenty days from the time of filing them, and not then, if an appeal duly filed, until the appeal should be tried. It was well known, as the debts were due, that there could not and would not be any appeal, and that executions might issue in each of those cases, about the 16th or 17th of June.

On the 10th of June 1823, after three other executions had issued at the suit of other persons, and the legality and regularity of which are not disputed, an execution issued on the judgment, first above mentioned, *The Bank of Pittsburgh* v. *Bosler and Bulin;* at whose immediate instance it issued, is disputed; but Mr *Poe* attended the sheriff, assisted in making the levy, wrote the schedule of every article levied on, urged the sale, got the advertisements printed, stating every article to be sold, and that they were to be sold on an execution issued by the *Pittsburgh Bank* against *Bosler* and *Bulin.*

As soon as the reports of arbitrations had been made, twenty days had expired and no appeal, executions were issued at the suit of *Stocker* and other persons for whom *Poe* was agent, and these were levied on the same personal property, but subject to prior levies. The personal property was sold, and produced about 6738 dollars, being enough to pay the three executions prior to that of the bank; and part of the execution of the bank, but not all of it; and leaving nothing for the subsequent executions of *Stocker* and the others.

I must now go back a little space. *Bosler* and *Bulin* owed to the *Bank of the United States* nearly 100,000 dollars, for which, or great part of which, sundry persons, their indorsers, were also liable; and to secure this debt, and save those indorsers, they, on the 26th of

May 1823, the very day before *Stocker* and others expected a report of arbitrations and lien, conveyed a large amount of real estate to the bank. There is no allegation that the debt was not fairly due, and the property conveyed, was put at a fair, nay, at a high price. To induce the bank to accept of it, *Bosler* and *Bulin* covenanted to discharge all liens which bound it at the date of the deed; and if he did discharge all prior liens, the bank were to release him and his indorsers from all claim, and take the property in full satisfaction of their demands. The deed to the bank was duly recorded. When Mr *Poe* first knew of this deed to the bank does not appear. The court of common pleas, which sat often in Pittsburgh by adjournment, was in session between the time of issuing the execution of the bank and the sale under that execution, but no application was made to the court on the subject.

On the 4th of August 1823, Mr *Baldwin* as the counsel of *Stocker*, but employed by *Poe, Stocker's* agent, took a rule to show cause why this *fi. fa.* issued at the suit of the *Pittsburgh Bank* against *Bosler* and *Bulin*, and on which this property had been sold, should not be set aside; and another rule, it does not appear by whom, on the sheriff, to bring the money into court.

Out of these proceedings arose the present feigned issue; much must have occurred between the August term 1823 and October 1826, when this issue was directed; and this matter was once before in this court.

A very wide range has been taken in the discussion here, and in the court below. The fairness of the conduct of *Bulin* and *Bosler* in their deeds to the *Bank of the United States* and other persons, none of whom are before this court, have occupied much time. The only question to be decided here must be confined to this execution, for the judgment is not attacked, and, so far as we see, cannot be.

This judgment, in the name of the *Pittsburgh Bank*, is anterior to the conveyance to the *Bank of the United States*, and unless its lien is lost for want of a *scire facias*, would take its amount out of the lands in preference to the *Bank of the United States*. The judgments of *Stocker* and others, of whom *Poe* is one at least, are subsequent to that conveyance, and unless their amount is recovered from this personal property, will not be paid. If they get the proceeds of this personal property, they throw the loss on the indorsers in the *Bank of Pittsburgh*, or on the indorsers in the *Bank of the United States;* for *Bosler* and *Bulin*, it is conceded, can never pay any thing.

Anthony Bulin, one of the firm of *Bosler & Co.*, was offered as a witness to prove that this execution of the bank was taken out with his assent, on the constant importunity of Mr *Poe*. The counsel of *Stocker* objected, and the witness was held to be interested—that he was bound to procure all liens on the property conveyed to be discharged; if he did so he was to be released; and if those liens were not all cleared off, he and his indorsers were not discharged. It appears to us that the interest of *Bulin* is exactly equal either way.

If this lien on the lands conveyed to the *Bank of the United States* is not extinguished by this levy and sale, *Bulin* will be liable to that bank for so much money as will extinguish it, and no more; the whole arrangement with that bank cannot be rescinded after it has recorded its deed, neglected to fix the indorsers by protest and notice, or if they were so fixed, permitted more than six years to elapse, and the statute of limitations to operate; it can then at most recover a judgment against *Bulin*, on his agreement to extinguish the lien, to the amount of such lien. If *Stocker* and others get this money, *Bulin* owes so much to the *Bank of the United States;* if the *Pittsburgh Bank* gets this money and their lien is extinguished, *Bulin* owes precisely the same sum to *Stocker* and others; he is then disinterested, or, what is the same thing, equally interested either way, and a competent witness.

When this cause was in this court before, (13 *Serg. & Rawle* 199) the chief justice, in delivering the opinion of the court, intended to put at rest most of the points now again brought before us. That opinion says, "the great objection to the plaintiff's action, and indeed it seems to me to be insuperable, is, that it calls in question the validity of an execution issued on a judgment, in a court of competent jurisdiction. The judgment on the bond of *Bulin & Co.* to the *Bank of Pittsburgh* was regular—nothing about stay of execution in the warrant of attorney on which it was issued. It was not void; if erroneous or irregular, it might have been set aside on writ of error, or quashed on motion; but without resorting to either of these methods the plaintiff has undertaken to invalidate it collaterally in this action; this is against all principle. The execution, until quashed or reversed, is good."

The court there state that a judgment informally entered is good until reversed; and the same principle applies to an execution; they state a judgment by fraud as an exception, but then the plea of *per fraudem* must be replied to it, and there is no question of fraud on this record, &c. Now it seems to me the same matter has been tried again in the same suit, on the same declaration, plea and issue, but with this difference, that this is a feigned issue, that a real one; and that the matter trying is in no respect different. No fact is stated to be ascertained by the issue; it is one in which law, equity and fact are blended; the matter and whole matter contested in the real suit is put in issue in this feigned issue, not even changing the form.

The opinion of the court was asked on sundry points proposed, and error is assigned in not answering the second, and in erroneous or equivocal answers to the third and fourth.

The second is not answered; it and the third may be taken together; they both ask the opinion of the court as to the effect of Mr *Poe's* conduct in procuring the execution, advertisement and sale on the judgment of the bank, and whether these acts do not preclude him from objecting to those acts, and setting all this aside.

The answer in the charge is, that the "jury may infer from those

facts that his urgency proceeded from a wish to secure the amount of his own personal debt, and of those judgments wherein he acted as agent for the plaintiffs." Now this, instead of answering the point proposed, amounts only to telling the jury that two inferences may be drawn from the facts proved, but does not tell them what the law would be, if found as the defendants supposed; and is erroneous, if found as the judge supposes probable. Each supposition admits he did the acts stated by the defendants, and the judge says if he did them with a view to secure *Stocker's* judgment, which he knew he would obtain on the 27th of May, and several others, among which was one of his own on the same day, that all may be right; that he may have used an execution on the bank's judgment to levy, advertise and sell *Bosler & Co.'s* property, and then turn round and say, "All this was mere show; I will now set it all aside, because as things have turned out, it suits my interest to do so, and that court ought to decree accordingly." The law is not so; the process of the court cannot be so made to be good if a man pleases, and bad if the same man pleases, without regard to the interest of any and every body else; this I say, supposing the execution of the *Bank of Pittsburgh* was legally issued—Was it so?

It is now settled in this state that a mortgage or judgment may be given to secure a creditor, not only for a debt due, but for responsibilities which are contingent, nay, for future advances. *Lisle* v. *Ducomb*, 5 *Binn.* 585. This judgment to the *Pittsburgh Bank* was, as the judge rightly decided, to secure the bank, and also to secure the indorsers on the notes of *Bosler & Co.* then in bank, or which should be given to renew those notes as they fell due. There was no stipulation for any stay of execution. The fairness and validity of this judgment is not questioned. *Bosler & Co.* are stated to have been in debt beyond all hope of extricating themselves. It was possible that they would on any day confess a judgment to some of their creditors, without stay of execution, and their large personal property might have been in an hour beyond the reach of this judgment. It was certain *Bosler & Co.* would never pay the notes in the *Pittsburgh Bank;* that the indorsers must pay them; they would all fall due in June. It was certain that *Stocker* and others would take executions on or about the 20th of June. It was no stretch of their authority in any of the indorsers in the *Pittsburgh Bank* to call for execution on that judgment on the 10th of June, and to levy it instantly. If *Bosler & Co.* had objected to this execution, it is not easy to discover on what grounds the court could have set it aside. We had some cases before us at Lancaster last May not unlike this. *Howry* and *Eshelman* were largely in trade, and largely in debt; they had borrowed money on bond, with some of their friends as sureties in those bonds, and in bank with some of their friends indorsers, and to secure those friends, had given them judgment without stipulating for any stay of execution. While those bonds and notes had still a short time to run, the creditors of *Howry* and *Eshelman* sued

them, entered rules of arbitration, and obtained judgment, and in twenty days could take, and in fact did take execution on the twenty-first day. In the mean time their sureties and indorsers took out executions on their judgments, though none of them had paid the debts for which they were sureties, and were not liable to suit for those debts for some days yet to come. The property was sold, and money brought into court. The common pleas decided, and under the act of 1827, an appeal to the supreme court, and the executions thus issued by the securities and indorsers took the money, by a decision of a majority of this court. In those cases the defendants, as here, made no objection to the first executions. I will add, that in those cases the sureties had paid the money for which they were bound before the money was brought into court, so that there was no danger of the surety recovering money from his principal to pay a debt, and afterwards not paying it. So here, the bank recovering the debt, the indorsers are thereby at once discharged; and although I was not entirely satisfied with the decision at Lancaster, yet, upon reflection, there is no actual injustice in collecting the debt from the principal in the first instance, instead of pressing the surety and turning him round to the principal. And when the form of the agreements will admit of its being collected from the principal, perhaps no court will interfere to throw it on the surety in the first instance. The authority of those cases would determine the same point in this case.

Towards the conclusion of his charge, the Judge comes to this opinion. "The case as a matter of fairness depends upon this," says he, "was the object of the acquiescence and waiving protection from the execution, to give a preference to particular creditors, who were the indorsers of *Bosler & Co.;* or was it the intent to get the control of the judgment, in order that the proceeds of the personal property might be applied at the option of the defendants, to secure any creditors they pleased? If the former was their object, and it is clearly made out, I should be disposed to think the defendants would be entitled to the money. If the latter, it appears to me the most dangerous effects would result from allowing it to pass without censure." And then again he says, "if the acquiescence on the part of *Bosler & Co.* be considered by the jury as a fraudulent acquiescence, the verdict will be for the plaintiff; and such will be your verdict, if you deem there was no acquiescence at all."

One of the alternatives in this, to wit, "was it the intention to get the control of the judgment in order that the proceeds of the personal property might be applied at the option of the defendants to secure any creditors they pleased," could not, I apprehend, be fairly put to the jury; for if the *Bank of Pittsburgh*, or the indorsers in that bank, took out an execution and levied on *Bosler & Co.'s* property and sold it, the debt of that bank was so far extinguished; if the bank permitted the proceeds of sale to be lost in the sheriff's

hands, or permitted the sheriff to pay it to any person who had not a prior levy, it would not alter the case; not even if this was done at the instance of *Bosler & Co.*, if any other judgment creditor of *Bosler & Co.* objected. A judgment creditor who has sold his debtor's property, is satisfied in law, to the amount of the sale, if his sale is not set aside; he never can demand that money, nor keep his judgment alive as to that money, as against other creditors. I do not see how it can then be left to a jury to decide, that the bank, which levied and sold and is claiming the proceeds, does not intend, and never intended to take the money; after it has got the money, it may give it away or throw it in the river; its debt is discharged, and the court and other creditors have nothing to do with the money after that. It seems to me, however, that where a creditor, who has taken execution on a fair and legal judgment and levied his money, and the sheriff brings it into court, cannot be deprived of it by leaving it to a jury to inquire whether he intends to make a good or bad, a probable or an impossible use of his proceedings and the money raised by the law for him.

The last proposition by the judge, is still more objectionable, it is, that "your verdict will be for the plaintiff, *Stocker*, if you deem there is no acquiescence at all;" that is, no acquiescence by *Bosler & Co.* Now, acquiescence, in this case, means, and must mean, no opposition. When a man's property is levied on and sold, and the money brought into court, and he makes no opposition, no objection, and no application to the court, he acquiesces; and if this state of things continues for years, and he whose property was sold, neither acts nor speaks in opposition to the proceedings, it is out of the question to leave it to a jury to decide, whether he acquiesces or not. If, however, the word *acquiesce*, in the hurry and inadvertence of the trial, was used instead of the word "assent," it will not mend the matter. After a silence, a want of objection or interference from 1823, an assent is to be presumed, or the length of time and change of circumstances will preclude them from expressing a dissent now, and it must be taken that they did not disagree, that they acquiesced at the time.

Judgment reversed and a *venire facias de novo* awarded.

Erie Bank *against* Gibson et al.

The neglect of an obligee or payee to sue the principal when requested by the surety, will not discharge such surety from his obligation, unless the request be accompanied by an explicit declaration by the surety, that if suit be not brought, he will consider himself discharged.

WRIT of error to *Crawford* county.

This was an action of debt on a note by the *Erie Bank* against *John Gibson*, *William Foster* and *William Magaw*. After the note became due, *William Foster* wrote to the bank thus:

"*Meadville, October* 15*th*, 1829.

"Mr *Rufus S. Reed*,

"Some weeks ago Mr *Magaw* received a letter from Mr *M. Sparren*, giving a statement of the amount due the *Erie Bank* on the note of *John Gibson*, for which he and myself are security. We have used every endeavour to get *Gibson* to pay it off, but without effect, unless he has done it lately. We have not seen him for a week or two, as he now lives at Coneaut lake. I saw Mr *Magaw* yesterday, and he desired that I should write to you on the subject. We see no way of securing ourselves from *Gibson*, unless suit be brought against all of us, and when judgment is obtained we will direct the sheriff to make as much of the money from him as we can; the balance we will of course have to pay. If any other course is pursued, we would *lose* the whole of it. The money originally was certainly for *Gibson's* use."

To which the cashier of the bank replied thus:

"*Erie Bank*, 2*d November* 1829.

"Mr *William Foster*,

"Dear sir,—Mr *Reed* put into my hands yours of the 15th ultimo, wherein you say you see no way of securing yourselves from *John Gibson*, unless suit be brought against all of you; but, my dear sir, when you put your name, as well as Mr *Magaw*, to that paper, you knew, or ought to have known what you were doing. We did not lend the money with the expectation of bringing suit; and when your and *Magaw's* names were to the note, we felt satisfied you would not suffer a suit, nor dreamed of such means to get the money back. I hope you will see this in its proper light, and pay as fast as possible; say send us the half now, and the other half in sixty days."

The following testimony was given by *J. S. Riddle*, Esq.

[Erie Bank v. Gibson et al.]

"Some time about the 1st of March 1830, Mr *Hamot* was in Meadville, and requested me to take the note in suit for collection. I told him I wished first to see *Magaw* on the subject. I accordingly called on Mr *Magaw*, and told him I had been requested to collect the note; and asked him if he meant to contest it. He replied that he supposed they were bound, and must pay it. I observed to him that if there was to be any controversy about it, I did not wish to be concerned against him. He gave me to understand that he would not go to the additional expense of litigating it. I then asked him if he had any objection to my taking the note for collection, and he said he had not. I then went back to Mr *Hamot* and gave him my receipt for the note for collection.

"On the same day, or a few days afterwards, I saw Mr *Foster* in town, and mentioned to him that the note had been left with me. He complained of the conduct of *John Gibson* in not having paid the note, but added there was no necessity of having a suit about it. It was proposed that a judgment bond should be given by him, *Gibson* and *Magaw*, and he agreed that I should draw one, which he would sign, and leave with me to get the signatures of *Gibson* and *Magaw*. Before I had time to go to my office to draw one, he told me he was desirous of going out home, but would be in town in a few days again, and would then sign the bond, and that in the mean time I might have an opportunity of seeing *Gibson* in town, and of getting his name to it.

"At this time he did not allege that there had been negligence on the part of the bank in bringing suit, nor that he considered himself exonerated, until he came to town again some days afterwards. He then declined giving judgment, alleging that the bank should have proceeded earlier. The suit was brought to the then next term."

The court were requested to instruct the jury upon the following points.

1. That the mere omission by a creditor to bring suit against the principal debtor does not discharge the surety.

2. That the letter of *William Foster* to Mr *Reed* did not contain that positive request to bring suit, and was not accompanied by any such declaration that otherwise the sureties would consider themselves discharged, which was necessary in law to exonerate them.

3. That if *John Gibson* was insolvent at the time the letter was written, the bank was under no obligations to proceed against him.

The court below was of opinion, that the omission of the bank to sue the principal, as requested by the letter of *William Foster*, one of the sureties, was a good defence against the plaintiff's action, and so instructed the jury, who found a verdict for the defendant. And the opinion was assigned for error.

J. S. Riddle, for plaintiff in error.

It is a conceded and well settled principle, that the mere delay of the creditor to sue the principal debtor does not exonerate the surety,

unless there is an express agreement to give time, or the terms of the contract are varied, or unless the delay has been unreasonable. *Hunt* v. *The United States*, 1 *Gallis.* 34, 35; *Fulton* v. *Matthews*, 15 *Johns.* 433; *Comwith* v. *Wolbert*, 5 *Binn.* 295, 300; *Thursby* v. *Gray*, 4 *Yeates* 518.

If the surety wishes to be freed from his liability, he must make an explicit request to the creditor to proceed, and at the same time give him notice that unless he does so, any further indulgence will be at his own peril. In those states where they have courts of chancery, the correct course of procedure would seem to be, to file a bill in equity, to compel the creditor to bring suit, or be enjoined from proceeding against the surety afterwards. But in Pennsylsylvania, where we have no court of chancery, a demand *in pais* is held to be sufficient. As, however, it comes in lieu of a bill in equity, it should be equally specific in all material particulars. It should clearly apprise the creditor of what was required of him and warn him of the consequences of neglecting such notice. *Cope* v. *Smith*, 8 *Serg. & Rawle* 116.

In the present case, the letter of Mr *Foster* did not give the explicit notice to which we were entitled, and it does not contain the slightest intimation, that if we did not proceed they would no longer be accountable. He writes, "we see no way of saving ourselves, unless suit be brought, &c." He does not insist on it, nor does he expressly require it; he suggests, it is true, that it would be most expedient for the sureties, but does not tell us, that unless we adopted this suggestion we must no longer look to them. And, if such had been the meaning he intended to convey, it is evident it was not so understood. The reply of Mr *Hamot*, the cashier of the bank, shows the way in which he viewed it. He does not refuse to sue, but says, "we did not expect to be obliged to bring suit, had hoped not to be driven to that alternative, and that defendants would see the matter in its proper light and pay, &c." But suppose he had been told by the sureties, that unless suit was instituted, they would be no longer held—he would then have been put upon his guard, and the presumption is fair, that as a vigilant officer of the bank, he would immediately have directed suit to be brought. It is apparent then, that the defendants were not so understood. Did they intend to convey any such meaning? *Magaw* did not mean to contest it. When Mr *Foster* was called on first, he made no allegation that the bank was in default, he agreed to give his judgment bond for the debt, he requested that process might not be issued, and the reason the bond was not executed, was that he was anxious to go out home before there was time to prepare one. Had he intended then that his letter should discharge him, he would at once have said, the bank has been dilatory, you neglected to sue when called upon, and now we are no longer liable. But nothing of this kind was alleged, and if they themselves did not intend to convey such meaning, would it not be unreasonable to require us so to understand them?

[Erie Bank v. Gibson et al.]

The doctrine in *Cope* v. *Smith*, has been fully recognized in *Gardner* v. *Ferrer*, 15 *Serg. & Rawle* 28, 30, in which a check is put upon these constructive equities, which had been carried to such extremes. In this case, too, the defence was put upon the ground, that the money might have been obtained from the principal; but that does not alter the rule.

The law knows no intention between principal and surety, they are both bound to the true interest of the instrument. *Roth* v. *Miller*, 15 *Serg. & Rawle* 100, 107. And it would be error to leave the construction of writings to the jury.

Foster and *Wallace*, for defendants in error, cited, 13 *Serg. & Rawle* 159; *Eddowes* v. *Niell*, 4 *Dall.* 144; *Cope* v. *Smith*, 8 *Serg. & Rawle* 110; *Pain* v. *Packard*, 13 *Johns.* 174; *Fulton* v. *Matthews*, 15 *Johns.* 433; *King* v. *Baldwin*, 17 *Johns.* 384; *Walker* v. *Bank*, 12 *Serg. & Rawle* 382; *Bank* v. *Walker*, 9 *Serg. & Rawle* 229.

The opinion of the Court was delivered by

Rogers, J.—In *Cope* v. *Smith*, 8 *Serg. & Rawle* 110, Chief Justice *Tilghman* investigated with great care all the authorities which bear upon the present question. In England, the surety must go into chancery, to compel the creditor to sue, or perhaps the principal to pay, but in New York the same result may be produced by a request *in pais*. This position is sustained by the court of errors, contrary to the opinion of all the law judges, except Chief Justice *Spencer*. The law was at one time supposed to be otherwise in Pennsylvania. In the *Commonwealth* v. *Wolbert*, Justice *Yeates* says, "a bill will lie in chancery, by a surety to compel a creditor to sue his principal; and equity will act on the refusal, or neglect to sue, particularly when the condition of the surety is thereby deteriorated. The surety has no such remedy here, he must pay the money on the bond, and take an assignment. Should he demand a suit against the principal, I should hold him bound to tender an indemnification." But in *Cope* v. *Smith*, the court came to a different conclusion, by dispensing with the necessity of an actual payment of the money by the surety. In that case, the attention of the chief justice, who delivered the opinion of the court, was directed to the rule most proper under the peculiar circumstances of the jurisprudence of this state. The result was, that a medium course was adopted, not so lax as the rule finally settled in New York, and that with me, is no slight recommendation. In *Cope* v. *Smith*, it was held, that the mere omission by a creditor to bring suit against the principal debtor, does not discharge the surety; but that if a creditor, after being requested to bring suit against the principal debtor, refuse, or neglect to do so, the surety is discharged; but the rule then laid down, has this important qualification, provided the request be proved clearly, and beyond all doubt; and provided, it be accompanied with a positive, explicit declaration, that unless the request be complied with, the surety

will be considered discharged. I am reconciled to the rule, by the fact that we have no court of chancery; for if we had one, I would compel the surety to seek his remedy there. No request or demand *in pais*, however solemn, and accompanied with whatever declaration, should discharge the surety from his responsibility. In laying down the rule for the government of suitors, the court thought proper to guard the exercise of the right with these restrictions and limitations, and these I do not feel inclined to disregard. A clear, distinct declaration, that unless the request of the surety to sue principal is complied with, he will consider himself discharged, seems to put the creditor on his guard. It evinces a determination on his part to exonerate himself from liability. It is then at the peril of the creditor, either to neglect or refuse to comply with the request; nor is this any hardship, as, according to the case of the *Commonwealth* v. *Wolbert*, he may require an indemnity; or according to *Gardner* v. *Ferrer*, he may offer the surety the right to bring suit in his name. That the court have heretofore been understood as establishing this rule, as I have stated it, appears from *Gardner* v. *Ferrer*, 15 *Serg. & Rawle* 28. It has undergone repeated discussions in this court. The chief justice says, in the case referred to, "I would be unwilling," (and in this I agreed with him at the time, and do so yet) "in cases of this sort, to go beyond the rule, in *Cope* v. *Smith*, 8 *Serg. & Rawle* 110, that the surety shall be exonerated only when the obligee has refused to bring suit, or, (what I take to be the same thing) to suffer the surety to do it in his name, after a positive request, and explicit declaration by the surety that he would otherwise hold himself discharged."

After two such recognitions of the rule, there should be some stronger reason than has been given for a change. It is not sufficient to show that in New York it has been decided differently, in opposition to the opinion of the legal talent of the supreme court of that state, (the chief justice excepted) and also plainly to the rule established in England. The rule, as settled here, carries with it this powerful recommendation. It is explicit, and of course easily understood, and is eminently calculated to prevent surprise. If any exception can be taken to it, it is that the court did not authoritatively require that the notice should be in writing. The letter of Mr *Foster* contains a request, sufficiently explicit to come within the meaning of *Cope* v. *Smith*, to bring suit against the principal; but there is no intimation, that unless suit was brought, *Magaw* and he would consider themselves discharged. It is true, they allege that to be the only means of securing themselves; but that is not sufficient. In the answer of the cashier, he declines complying with the request, and says, with great reason, as I think, that the bank did not lend the money with the expectation of bringing suit, and when they, *Foster* and *Magaw's* names, were to the note, the bank felt satisfied, they would not suffer a suit, nor did they dream of such a means of getting rid of paying the money. He adds, I

hope you will see this in its proper light, and pay, as fast as possible; say, send us the half now, and the other half in sixty days. It is evident that the bank had no intention to discharge the security, nor idea that this would be the legal effect of their refusal; nor could they suppose so, if they were aware, as they are presumed to be, of the case of *Cope* v. *Smith*. To this letter they received no reply. If the sureties intended to insist on a suit, at the risk of the creditor of discharging them from liability, their course was plain. They should then have put the bank on their guard, by demanding it as a right, under the penalty which would result from a refusal. To discharge them, without this, is evidently taking the bank by surprise, and this it is the object of the rule to prevent. In truth, this case is a strong illustration of the wisdom of the rule. The creditor has rights as well as the surety, and this it ought to be the object of all well regulated societies to guard. There is a danger in impairing securities of this kind. At least creditors are entitled to a fair protection, not only as against the principal, but his sureties. It is frequently on the faith of the latter that the creditor relies, without which the loan would not be afforded. As the bank had no idea, neither had *Foster* and *Magaw*, that the liability had ceased, and this appears beyond question, in the testimony of Mr *Riddle*. As late as the 1st of March 1830, Mr *Riddle* called on *Magaw*, and told him he had been requested to collect the note, and asked him if he meant to contest it. He replied, he supposed they were bound, and must pay it. He did not wish to go to the additional expense of litigating it. Mr *Riddle* afterwards spoke to Mr *Foster* about it. Mr *Foster* complained of the conduct of *Gibson*, but added, there was no necessity of any suit about it. It was agreed that *Gibson*, *Foster* and *Magaw* should give a judgment bond for the money. At that time they did not allege that the bank had been guilty of negligence, nor that they considered themselves exonerated. Some days afterwards *Foster* declined giving a judgment, saying, that the bank should have proceeded earlier. If *Magaw* and *Foster* should succeed in the defence, it will be a confirmation of the truth of the observation of Chief Justice *Gibson* in *Gordon* v. *Ferrer*, "that courts of equity have gone to an extreme in favour of sureties, often granting relief for a constructive equity, the existence of which the surety did not even suspect."

The counsel for the defendant in error say, it is against equity for a creditor to refuse to bring suit against the principal. However true this may be as a general proposition, I doubt its truth here. It seems to me it would have been against equity, because contrary to their engagement, for the sureties to have insisted on the bank's bringing suit against *Gibson*. It is very well known that the bank looks to the payment of money loaned, at the maturity of the bill. That is a course of dealing which is absolutely necessary to their prosperity, and with which their customers are, or are supposed to be, well acquainted. There was, therefore, a propriety in the an-

swer of the cashier of the bank, which is in conformity to the ordinary course of mercantile dealing. If this had been a note drawn in the ordinary form, there would be no doubt of this, but, in substance, the contract is the same, and was so understood, by at least one of the parties, to which the other did not dissent. The only difference is, that instead of drawing the notes payable to order, and indorsing them in the ordinary form, the sureties sign their names to the note itself, in which they promise to pay. Although this note may not have been strictly negotiable, (and whether it was or not we cannot say, it not being produced) it partakes of that character, so far as regards this question.

Judgment reversed, and a *venire de novo* awarded.

Owens *against* Dawson.

In an action of *assumpsit*, a bill in chancery cannot be given in evidence as an admission of facts against the complainant himself, except in the case of pedigree, and not then, unless the party claims or derives title in some manner under the plaintiff or defendant in the chancery suit.

ERROR to *Fayette* county.

This was an action of *assumpsit* by *Joshua Dawson* against *Vincent Owens*, for money had and received, and for goods sold and delivered. Pleas, *non assumpsit*, and payment with leave, &c.

It appeared that a certain *John Lang* had been indebted, by note, to *Dawson*, in the sum of 450 dollars; that *Dawson* had given *Owens* an order on *Lang* for 300 dollars, which was to be a credit on *Lang's* note, which was then delivered to *Owens*. *Owens* received from *Lang*, on the order, 177 dollars and 79 cents, and afterwards recovered against him 60 dollars. It was alleged by *Dawson* that the whole amount of the order was not owing by him to *Owens;* and to prove the issue on his part, the plaintiff below offered in evidence a bill in chancery, filed in the superior court of chancery in Winchester, Virginia, by *John Gordon* and *Frederick Light*, against *Joshua Dawson*, *Vincent Owens* and *John Lang*. The defendant objected to the reading of the said bill. The court admitted the evidence; and the defendant excepted.

In the proceedings in chancery, the *subpœna* was served on *Lang*, and on *William* or *Vincent Owens*. *Lang* alone answers. The decree, and the rest of the record, excepting the bill, was admitted by consent, or, all the facts stated in it were admitted. The bill alleges the receipt of 100 dollars by *Owens*, from *Lang*, "which sum of 100 dollars, the plaintiffs believe, is as much as said *Owens* is entitled to."

The admission of the bill in chancery was the only error assigned.

N. Ewing, for plaintiff in error, cited, *Starkie's Ev.* 286; 2 *Selw. N. P.* 211; 1 *Phil. Ev.* 263.

Austin, for defendant in error, cited, *Phil. Ev.* 282.

The opinion of the Court was delivered by

Rogers, J.—This was an action of *assumpsit*, for money had and received for goods sold and delivered. Pleas, *non assumpsit*, and payment with leave, &c.

The case was this. *John Lang* was indebted to *Dawson* 450 dollars. *Dawson* gave *Owens* an order on *Lang* for 300 dollars, which was to be a credit on *Lang's* note, which was delivered to *Owens*. *Owens* received from *Lang*, on the order, 177 dollars, and afterwards recovered from him 60 dollars. It was alleged by *Dawson* that the whole amount of the order was not owing by him to *Owens*, and for the difference this suit was brought. To prove the issue, on his part, the plaintiff offered in evidence a bill in chancery, filed in the superior court of chancery in Winchester, Virginia, by *John Gordon* and *Frederick Light* against *Joshua Dawson*, *Vincent Owens* and *John Lang*. The defendant objected to the reading of the bill, but the court admitted the evidence, and the defendant excepted. The admission of the evidence is the only error assigned. It must also be stated, as part of the case, that the *subpœna*, in chancery, was served on *Lang*, and on either *Vincent* or *William Owens*, but not on *Dawson*. *Lang* alone made answer. The decree, and the rest of the record, excepting the bill, was admitted by consent, and all the facts stated in it admitted. The bill alleges the receipt of 100 dollars by *Owens* from *Lang*. In this there was error. Answers in chancery, which are confessions, are strong evidence against the party who makes them. But a bill in chancery wherein many of the facts are the mere suggestions of counsel, made for the purpose of extorting an answer from the defendant, will not be in evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer, or the deposition of witnesses. It is not admitted in courts of law, as evidence, to know any fact either alleged or denied in the bill. Lord *Kenyon* is reported to have admitted a bill in chancery, filed by an ancestor, to be evidence of a pedigree there stated, as a declaration in the family. But it was resolved by the judges, in the *Banbury Peerage* case, on a question put to them by the house of lords, that a bill in equity, or depositions, cannot be received in evidence in the courts of common law, on the trial of an ejectment against a party not claiming or deriving title in any manner under the plaintiff or defendant in the chancery suit, either as evidence of the facts therein deposed, or as declarations respecting pedigree. The law seems, therefore, to be now settled, that a bill in chancery cannot be given in evidence as an admission of facts against the complainant himself, except in the case of pedigree, and not even then, except as a party

who claims or derives title in some manner under the plaintiff or defendant in the chancery suit.

The bill was not offered to prove pedigree, but the fact that *Owens* had received one hundred dollars from *Lang;* and if the bill would not, as we have shown, have been evidence against the complainants, it is difficult to conceive in what way it can be made evidence, for that purpose, against *Owens* in favour of *Dawson.* It must be remarked, that the *subpœna* was served on *Lang*, and on either *Vincent* or *William Owens*, but *Lang* alone answers. It was not served on *Dawson;* so that the only person who can be said to have admitted the facts, was *Lang.* This, therefore, was *res inter alias acta*, and not admissible as evidence, either for or against either *Dawson* or *Owens.* A decree in chancery may be given in evidence on the same footing, and under the same limitations, as the verdict and judgment of a court of common law. If this, then, had been a suit by *Gordon* and *Light* against *Dawson*, *Owens* and *Lang*, a judgment against *Dawson* and *Lang* would not be evidence in a suit between *Dawson* and *Owens.* The fact that the rest of the record, excepting the bill, was admitted by consent, and all the facts stated in it admitted, does not alter the case. We have no right to extend the case beyond the agreement of the parties. It is true that, according to the course of the chancery practice, there was a decree against all the defendants, although it was *Vincent Owens* that was served with notice of the bill, and it was certain that *Dawson* was not. This proceeding in chancery was *in rem*, and not *in personam.* The right to appear and show cause against the decree is reserved to the absent defendant.

We cannot think that the allegations in the bill ought to be given against either of the defendants, by the other, in a suit between them, as it is uncertain whether either had notice of even the filing of the bill, and cannot be supposed, except as between the complainant and them, to have admitted the truth of them. If *John Lang* paid the sum alleged in the bill, he was a competent witness to prove the fact, in a suit between *Owens* and *Dawson.*

Judgment reversed, and a *venire de novo* awarded.

Reed *against* Dickey.

A defendant in ejectment will not be permitted to avail himself of a breach of contract, in relation to the land in controversy, by one under whom he claims, in order to exclude evidence which, if the contract had been complied with, would have been competent.

The declarations of one under whom a party in ejectment claims may be given in evidence against him, if such declarations were made during the time the witness was the occupier of the land.

ARMSTRONG county.

William Reed, who survived *Victor Dupont*, assignees of *Archibald M'Call*, brought this ejectment against *Archibald Dickey* and *William Dickey*, to recover the possession of four hundred and twenty acres of land. On the trial, the plaintiff offered in evidence an agreement of February 1800, between *Archibald M'Call* and *Alexander Campbell*, to be followed by proof that *Campbell* sold the land to *Templeton*, who sold to *Archibald Dickey*, one of the defendants. The material part of the agreement is this.

"Witnesseth, that the said *Alexander*, for and in consideration of the covenants hereinafter mentioned on trust of the said *Archibald* to be done and performed, doth covenant to and with the said *Archibald M'Call*, that he now has the only actual settlements on two certain tracts of land, surveyed for the said *Archibald M'Call*, in Gapin's district, north and west of the Alleghany river, on the heads of Buffaloe, surveyed in the names of *John Pell, Sen.* and *Nicholas Day*, and that he will continue, or cause to be continued, the same on the said land, agreeably to the provisions of the act of assembly of the 3d of April 1792, for the space of five years from his first settling the same, and hold the same for the said *Archibald M'Call*. In consideration whereof the said *Archibald M'Call* doth covenant to and with the said *Alexander*, that the said *Alexander* having fulfilled his covenants aforesaid, he will at the expiration of the said term convey and assure unto the said *Alexander*, or his assigns, three hundred acres of the tract surveyed in the name of *John Pell*, including the improvements of the said *Alexander*, the same to be taken off the north end of the tract, at the expiration of the aforesaid term, and will warrant and defend the same."

This evidence was objected to, on the ground that the plaintiff must first show that an improvement and settlement had been made by *Campbell*, at the date of the said agreement. The court sustained the objection, and the evidence was rejected, which was the first error alleged.

The plaintiff proposed to ask a witness, what *Philip Templeton*, who had once owned the land, said respecting the title to it, and his

knowledge of *Archibald M'Call's* claim; which was objected to, and rejected, which was assigned as the second error.

Bredin, for plaintiff in error.
Blair, for defendant in error.

The opinion of the Court was delivered by

Rogers, J.—In this suit, which was an action of ejectment, the plaintiff offered in evidence, an article of agreement, dated the 2d of February 1800, between *Archibald M'Call*, under whom he claims, and *Alexander Campbell*, accompanied with an offer to show, that *Campbell* sold to *Philip Templeton*, who sold to *Archibald Dickey*, one of the defendants. The testimony was objected to, on two grounds. First, that the agreement was not duly proved, and secondly, that testimony ought previously to have been given of an improvement and settlement of *Campbell*, before and after the date of the agreement, according to law. The court decided, that the agreement was duly proved, but were further of the opinion, that such proof of improvement and settlement, ought first to be given. The exclusion of the testimony is one of the errors assigned. The article of agreement was the first link in the chain of title, and contained a contract, which is not uncommon in that section of the state, nor opposed, that I can perceive, either to the words or spirit of the act of 1792. It is material, to observe the relative situation of the parties, as contained in the plaintiffs' offer. The plaintiffs offer to prove, that *Campbell* sold to *Templeton*, who sold to *Dickey*, one of the defendants; the effect of which testimony is to make this a contest of the same nature, as if the original contracting parties were now before the court. Is it then competent for *Campbell*, or which is the same thing, those who claim under him, to object that no settlement has been made on the land? or, in other words, can he allege his own default, as a reason for a non compliance with the contract? In the article of agreement, *Campbell* avers, that he had made a settlement, and covenants that he will continue the same agreeably to the provisions of the act of the 3d of April 1792. In consideration whereof, *M'Call* entered into the covenant contained in the article. *Campbell* then is estopped from denying that a settlement was made within the true intent and meaning of the act. He cannot be permitted to allege his own breach of contract, as a reason for withholding the possession from the plaintiff. He stands in a different situation from a stranger, against whom, doubtless, it would be necessary to prove a previous settlement. Besides, as between these parties, there is proof sufficient to throw the *onus probandi* on the defendant. We have the acknowledgement of *Campbell* under whom the defendant claims, that a settlement had been made, and also a covenant on his part to complete the title. As between the parties to the deed, it is of little worth whether the land was improved or not. The plaintiff is will-

ing to take the title with all its imperfections on its head, and it is not for the defendants to gainsay it; for this would enable him to take advantage of his own defaulter. The covenant in the article runs with the land and descends upon the occupiers with notice; and this is the situation of *Dickey*, under the proof which accompanied the plaintiffs' offer. *Campbell* covenants that he had made a settlement, and would continue it so as to complete the title. Had *Campbell* carried into effect his contract in good faith, *M'Call's* title would have been without exception. It is only on account of the default of *Campbell*, that a shadow rests upon it. The evidence conduced to prove the issue, and should have been received. It will be observed, that the case is put upon the special facts, and on the first objection; but whether the plaintiff has complied with his part of the contract, it is not now necessary nor is it intended to decide. Of this the defendants will have a right to avail themselves, when the question fairly arises.

The plaintiff in error also excepts to the opinion of the court, in refusing to receive evidence of what was said by *Philip Templeton*, as to his having purchased the land in despite of *Alexander Campbell* and his mother-in-law Mrs *Davidson*, and what he said as to his knowledge of the claim of *Archibald M'Call*. As this point is stated, we cannot say there is error. If these declarations were made during the continuance of his interest, they are evidence as well against himself, as those who claim under him. The propriety of the testimony depends upon two matters which do not distinctly appear. First, that the declarations were made when *Templeton* had an interest, and secondly, that *Dickey* claims under *Templeton*. The latter, the plaintiff was prevented from showing, by the exclusion of his first offer.

Judgment reversed, and a *venire de novo* awarded.

Commonwealth ex rel. Hall *against* Cook.

A citizen of the district of Columbia removed into Pennsylvania to reside, and brought with her a slave, who in consideration of manumission, with the consent of her mother, bound herself by indenture to serve for seven years. *Held:* That such indenture, having been executed in Pennsylvania, is void, and the slave is entitled to her liberty.

HABEAS CORPUS case.

Ellen M. Williamson, of the District of Columbia, was the owner of *Hannah Hall*, a slave for life; she removed into Pennsylvania to reside, and brought *Hannah* with her; after their residence here had commenced, the said *Hannah*, by and with the advice and consent of her mother, and in consideration of manumission, bound herself by indenture to serve for seven years. The indenture recited, that it was entered into in pursuance of a parol agreement made before their removal into Pennsylvania; but there was no proof of this fact. The indenture thus made was transferred to *George A. Cook.* The only question which arose was, whether an indenture in consideration of manumission, executed in Pennsylvania, had any validity.

W. W. Fetterman, for relator.
Darrah, for respondent.

The opinion of the Court was delivered by

Rogers, J.—This was a *habeas corpus*, issued at the instance of *Hannah Hall.* The respondent returns, that he holds the said *Hannah Hall* by virtue of a deed of indenture, executed by the said *Hannah Hall*, by and with the consent of her mother of the one part, and *Ellen M. Williamson* and *B. Williamson* of the other, by which said indenture the said *Hannah Hall* binds herself to serve for the term of seven years, to learn the art and mystery of a servant and waiter; in consideration of manumission from slavery, granted in the District of Columbia, to the said *Hannah Hall.* The said indenture, by and with the consent of her mother, was assigned for a valuable consideration to the said *George A. Cook.* There are some facts connected with the case about which there is no dispute. It is agreed that *Hannah Hall was* the slave of *Ellen M. Williamson.* That the mistress brought her slave within the limits of the state, with the intention to reside in Pennsylvania. And that the indenture of servitude was not executed until the 10th of November 1830, several days after their arrival at Pittsburgh, with intention of making it a place of permanent abode. The second section of the act of 29th March 1788, enacts, that all and every slave or slaves, who shall be brought

into this state, by persons inhabiting or residing therein, *or intending to inhabit or reside therein*, shall be *immediately* considered, deemed and taken to be free, to all intents and purposes. This section, among others, was enacted (as the preamble recites) for preventing many evils and abuses, arising from ill-disposed persons availing themselves of certain defects in the act for the gradual abolition of slavery, passed the 1st day of March, in the year of our Lord 1780. Under the construction which this act must receive, it will not admit of doubt, that unless something is shown other than the facts which I have stated; the relator is entitled to be discharged. Her case is brought within the letter, and the obvious intention of the legislature, who have declared that as soon as the limits of the state are passed, with the purpose of settlement, the slave shall be deemed and taken free, to all intents and purposes. If free at the time the indenture was executed, the indenture is void; the laws of Pennsylvania not recognizing such a contract, without regard to colour.

It is, however, contended, that the indenture is good, under the thirteenth section of the act of 1st March 1780. No covenant of personal servitude or apprenticeship whatsoever, shall be valid or binding on a negro or mulatto, for a longer time than seven years, unless such servant or apprentice were, at the commencement of such servitude or apprenticeship, under the age of twenty-one years; in which case such negro or mulatto may be holden as a servant or apprentice respectively, according to the covenant, as the case shall be, until he or she shall attain the age of twenty-eight years, but no longer. It is said to be a necessary implication from this act, that a binding within the times therein limited is good, and such are the authorities, provided the indenture was executed in a state where slavery is recognised, by a person who, at the time, was a slave. 1 *Yeates* 365, 235; 6 *Binn.* 204; 4 *Serg. & Rawle* 218. These decisions are in favour of liberty. A servitude for a term of seven years being substituted for unlimited slavery during life, forms the consideration of the contract. To this extent the authorities have gone, but no further. No decision has been made similar to this, which presents the case, as is contended, of an indenture made in this state by a person who had been a slave, in pursuance of a previous agreement in another state. Whatever may be thought of the point when it fairly arises, there is one thing very clear, that if the respondent wishes to detain a fellow being in servitude on that ground, it is nothing unreasonable to require him to produce unexceptionable proof of the fact on which he founds his claim. Is that the case here? The only evidence is the recital in the indenture, without any testimony to show the circumstances under which the deed was executed. Whether it was read and explained to her we know not. We are required to presume this, but if presumptions are to be made, they should be in favour of liberty. It is by no means a strained presumption to suppose the master to be informed, and the slave to be ignorant of her rights. Our law protects the interests of

married women, who cannot be deprived of their property without being fully informed of the nature of the instrument which they are required to sign; and surely a person in the helpless and unprotected situation in which the relator was placed, requires equal, if not greater protection. It will be readily seen to what abuses this would lead; and I must be permitted to say, that I am not without suspicion that this case does not form an exception. The pains taken in the indenture to recite the agreement, and the studious care which is taken to explain the joy with which she acceded to the terms, are sufficient, in themselves, to create a doubt of the entire fairness of the transaction. It may be, and I should require some proof to the contrary, that this was an expedient to retain her services, resorted to by the master after he had attained a knowledge of the laws of this state, but a knowledge of which was carefully concealed from her. Hence the necessity of requiring proof that she was fully informed of her rights, to prevent the imposition to which, from her situation, she would necessarily be subject. If an agreement was in truth made in the District, some reason should be assigned why it was not reduced to writing; for it seems unlikely that an agreement of this consequence should be left to rest in parol. Besides, if the fact was as is stated in the indenture, it was so easy of proof, that the absence of testimony in regard to it should have been explained. It is improbable that such a contract would have been made, unless in the presence of some person who might have proved the bargain and the attending circumstances. As we think that the respondent has failed in the proof of this fact, and without intending to express any opinion whether an agreement in the District of Columbia would have entitled the master to her services, the court adjudge the relator free, and entitled to be discharged.

The opinion of the court on this part of the case makes it unnecessary to notice the other points which were pressed upon us by the relator's counsel.

Commonwealth ex rel. Hall *against* Robinson.

An indenture executed in Pennsylvania, by a slave from the District of Columbia, by which he bound himself to serve for seven years in consideration of manumission, is void; although made in pursuance of a parol agreement entered into in the District of Columbia.

HABEAS CORPUS to *William Robinson, Jun.* upon the relation of *Hannah Hall* for her son *F. Hall.*

The facts of this case were the same substantially as those given in the preceding case of the *Commonwealth* v. *Cook*, with this additional fact, that the indenture was executed in pursuance of an agreement entered into by the slave, with consent of his mother, before they left the District of Columbia.

The cause was argued by

W. W. Fetterman, for relator.
Colwell, for respondent.

The opinion of the Court was delivered by

ROGERS, J.—This presents the case of a person bound to servitude in the state of Pennsylvania, in pursuance of an agreement for that purpose, made in the District of Columbia, and in that respect it differs from the *Commonwealth* v. *Cook*, decided at this term. In the case referred to, the court declined giving any opinion, whether if the agreement had been clearly proved to have been made out of the state, the relator would be entitled to be discharged. To the *habeas corpus*, the respondent makes the following return, which has been fully proved by the evidence given on the part of the respondent. "*William Robinson, Jun.* in obedience, &c. respectfully returns, that he holds *Francis Hall* as his servant or apprentice, by virtue of an indenture entered into by the said *Francis Hall*, with the consent of his mother *Hannah Hall*, now *Hannah Butler*, with *Basil Williamson*, formerly of the city of Washington, but more lately of the city of Pittsburgh, whereby the said *Francis Hall* covenanted to serve the said *Basil Williamson*, until he, the said *Francis Hall*, should attain the age of twenty-eight years, viz. until July 1852; which indenture was executed in the said city, on the 18th of November 1830, in the presence and with the approbation of *C. H. Israel*, an alderman of the said city of Pittsburgh, in pursuance of a verbal agreement entered into between the said *Hannah Hall*, for herself and her son, the said *Francis Hall*, who was then —— years of age, and *Ellen Maria Williamson*, their mistress in the said city of Washington, while she, the said *Hannah*, and he, the said *Francis*, were

slaves, a few days previously to leaving the said city with a view to reside in Pittsburgh, and which agreement was made at the earnest solicitation of the said *Hannah Hall*, who was unwilling that herself and her children should be sold as slaves. The indenture before mentioned was made to *Basil Williamson*, in pursuance of an agreement to that effect, between the said *Ellen Maria Williamson*, her father the said *Basil Williamson*, and the said *Hannah Hall*, for herself and her children, and stated at large in the said indenture. The said indenture of servitude or apprenticeship of the said *Francis Hall* was informally assigned, some weeks since, to the said *William Robinson, Jun.* by *S. Caldwell*, as attorney in part of *Basil Williamson*, with the understanding that a formal indenture should be executed." Since the case of the *Commonwealth* v. *Cook*, so recently decided, it is not open to argument, that, independent of the penal agreement mentioned in the return, the relator must be discharged. It remains then for us to inquire, and our attention has been thus directed, whether that circumstance makes any difference; and we are of opinion that it does not. The preamble of the thirteenth section of the act of the 1st of March 1780, recites the mischief which the legislature intended to remedy. "And whereas attempts," says the preamble, "may be made to evade this act, by introducing into this state negroes and mulattoes, bound by covenant to serve for a long and unreasonable term of years, if the same be not prevented." "Therefore, no covenant of personal servitude, or apprenticeship whatsoever, shall be valid or binding, &c."

The evil which the legislature seems to have foreseen, was a binding without the limits of the state, for a considerable length of time, for the purpose of introducing them within the state. And this seems to have been the view which the supreme court took of the act in *Respublica* v. *Jailor of Philadelphia County*, 1 *Yeates* 368. This was the first case, after the passage of the act, which recognizes the validity of an indenture of a slave, in consideration of manumission. The court, in speaking of a binding out of the limits of the state, use the following language. "The thirteenth section was enacted to prevent the evils which would result from attempts to evade the spirit of the law, by importing negroes or mulatto servants into the state, for long terms of years. But negroes or mulattoes, bound in other states, to serve until twenty-eight years, whose indentures have been executed to liberate them from a longer servitude or from slavery, and *brought into the state*, may be holden as servants, according to their indenture, under the express words and meaning of the act." It must be observed, that this was the first case decided on the act, and may be regarded as in some measure a contemporaneous exposition of it. The words *bound in other states* and *brought into this state*, are in italics, which is some slight intimation, that the court considered these circumstances as essential to the validity of the contract. The spirit of the decision is this, that

the person bound, must be in a condition to receive an advantage from the contract; and this is the case of a slave or servant for a very long time, for whose benefit it is to exchange that condition, for the mitigated servitude recognized by the law of this state. It is on this principle that the binding of a slave, who has absconded, may be made within the state. It would be a useless ceremony to take the slave out of the state to make the indenture valid. *The Commonwealth* v. *Clements*, 6 *Binn.* 207.

The act also uses these terms, "*no covenant* of personal servitude or apprenticeship, shall be binding." When the legislature uses a legal term, it is supposed to be with a legal signification. A covenant is defined to be "the agreement or consent of two or more by deed, in writing, sealed and delivered, whereby either or one of the parties doth promise to the other, that something is done already, or shall be done afterwards." *Vide Jacob's Law Dict.* and *Sheppard's Touchstone.* Under the act of 1770, also, a binding of an apprentice must be by indenture. Without insisting on the danger of imposition, which would result from allowing a parol agreement to validate an indenture, we are of opinion, that to make the contract binding, it must be by indenture, as in the case of apprenticeship, or executed before the mulatto or negro is brought within the state. In adopting this rule, we impose no hardship on persons who may wish to introduce that class within the state. It is as easy to execute the indenture out, as in the state. It is presumed, that before they take a step of this kind they will inform themselves of the statutes of the state, and conform to the regulations which may be required.

Lyon *against* Allison.

In an action for a legacy brought against executors and a devisee of land charged with its payment, a report of arbitrators was made in favour of the executors, and against the devisee, from which one of the executors (the other dissenting) appealed, without the payment of the costs: *held*, that the appeal was rightly stricken off by the court of common pleas.

ERROR to the common pleas of *Erie* county.

This was an action for a legacy by *Robert Allison* and wife against *Thomas Greenwood* and *Jasper Lyon*, executors of *Thomas Lyon* deceased, and *Joseph Aikin*, terre tenant, with notice to *John Lyon*, the devisee. This declaration was filed:

"*Thomas Greenwood* and *Jasper Lyon*, late of said county, executors of the last will and testament of *Thomas Lyon* deceased, and *Joseph H. Aikin*, terre tenant of the land, were summoned to answer, with notice to *John Lyon*, the devisee of the land, *Robert Allison* and *Jane* his wife, in a plea of debt, whereupon they unlawfully detain, &c. And thereupon the said plaintiffs, by *John Riddle*, their attorney, complain: for that *Thomas Lyon*, late of the county of Erie aforesaid, heretofore, to wit on the 10th day of July, A. D. 1827, being seised in his demesne as of fee, of and in a certain tract of land, situate in the township of Harbour Creek, in the county aforesaid, lying on the Buffalo road, about nine miles east of the borough of Erie, and being the same on which his son *John* resided. And being so seised, he, the said *Thomas*, on the 10th day of July aforesaid, made his last will and testament, in writing, [since his death duly proved] and therein devised the one half of the aforesaid tract of land to his son, *John Lyon*, in fee simple; subject, however, among other things, to the payment to his daughter, *Jane Lyon*, the sum of 100 dollars, to be paid within two years of the decease of the said *Thomas Lyon*. That the said *John* accepted the land so devised to him, and took the possession of the same, and leased it to the present terre tenant, *Joseph H. Aikin*, who now holds the same by virtue thereof, &c. And the said *Jane Lyon*, after the death of the said *Thomas Lyon*, and before the commencement of this suit, intermarried with the aforesaid *Robert Allison*. And the said plaintiffs aver, that after the expiration of the aforesaid two years from the death of the said *Thomas Lyon*, and before the commencement of this suit, the aforesaid legacy of 100 dollars was demanded by the plaintiff, of the defendants, but the same has been neglected by them, to the damage of the said plaintiffs, &c."

At the instance of the plaintiffs, arbitrators were chosen; the cause was tried before them, and they made the following report. "Septem-

ber 10th, 1830, arbitrators report an award in favour of the plaintiff for the sum of 100 dollars, with interest from the 12th of September 1829, charged on the land in the declaration mentioned, as there set forth; judgment to be entered on this award, so as to allow execution to go against the land only charged as aforesaid, and not the persons or other property of the defendants."

On the same day that the award was filed, *Jasper Lyon*, one of the executors, appealed from it, without oath or bail.

On the 29th of September, *Thomas Greenwood*, the other executor, dissented from the appeal.

At the next term, Mr *Riddle*, attorney for the plaintiffs, asked the court to quash the appeal, for these reasons:

1st. Because there is no affidavit or recognizance; and because the costs are not paid.

2d. Because the appeal is entered by *Jasper Lyon*, who was not summoned; and the other executor who was summoned dissents.

3d. If the appeal is good as to the executors, it is not good to the others who are the real parties in interest, and who cannot appeal without complying with the act of assembly as to costs, &c.

The court below quashed the appeal, and this writ of error was sued out to have the same reinstated.

J. Banks, for plaintiff in error.
J. S. Riddle, for defendant in error.

The opinion of the Court was delivered by

Huston, J.—It sometimes happens in our practice, that a man's name is used as a plaintiff who has no interest in the matter trying, is not liable for costs, and cannot release the action: as in the case of the obligor of a bond, which has been informally assigned; his name is used as plaintiff for the use of him to whom it was transferred.

In this suit the executors are joined, that if there were debts of the testator which would require the assets of the estate to pay, they might make it known; that if they should allege that the legacy was not a charge upon the land, they might have a decision on that subject; and if that decision should be that the land is charged, and the legacy shall be levied down from it, the executors are discharged, and have no further interest in, or control over the cause. There was, then, no error in quashing this appeal. Every circumstance and fact prove that the appeal was not *bona fide* by the defendant as executor, but really for the purpose of delay, to benefit his brother, against whose land the judgment was. If this appeal be sustained, what is to be tried? The court cannot try the interest of the devisee; he has not appealed. The only matter that could be tried would be, whether there should be a judgment against the executors. They and the estate are now clear. When executors sever in pleading, the court will take that plea which is best for the estate;

clearly it is not best for the estate that this burthen should be taken from the devisee of this land and put on the general estate.

Judgment affirmed.

6 W P S R. 432

Hoge *against* Hoge.

Declarations of a testator, made contemporaneously with his will, are competent evidence to establish a trust in him to whom an absolute estate is devised, when followed by evidence that such devise was obtained by the fraudulent procurement of the devisee.

If a testator be induced to make a devise, by the promise of the devisee that it should be applied to the benefit of another, a trust is thereby created, which may be established by parol evidence; and this is not contrary to the statute of wills.

If a compromise of a doubtful right be obtained from a plaintiff through the misrepresentation of a witness, and in consequence of the influence of his testimony, and the persuasion of arbitrators, to whom the same had been referred: it is not binding, if the defendant knew of such misrepresentation, and availed himself unduly of its influence.

ERROR to the common pleas of *Washington* county.

This was an action of ejectment by *William Hoge* against *William Wilson* and *William Hoge*, son of *David Hoge*, brought to December term 1827, to recover the possession of an undivided equal third part of six hundred acres of land, adjoining the borough of Washington. Both parties claimed under *William Hoge*, and admitted that he died seised of an estate in fee simple in the land in dispute.

The plaintiff below, on the trial, in order to support his claim to the land, gave in evidence the last will and testament of *William Hoge*, the deceased, dated the 21st day of September 1814, and proved the 9th day of November 1814, by which he, *inter alia*, devised as follows, to wit: "I devise, will and direct, that my lands should be divided into three equal shares or portions, according to quantity and quality; one of which shares or portions I devise to the male heirs of my deceased brother, *Jonathan Hoge*, their heirs and assigns for ever; the second share or portion I devise to the male heirs of my brother, *David Hoge*, their heirs and assigns for ever; and the remainder share or portion I devise to my brother, *John Hoge*, his heirs and assigns for ever; also after the decease or marriage of my said well beloved wife, *Isabella Hoge*, I devise and bequeath to my aforesaid friend and nephew, *James Blaine*, all my quit rent estate, to be held during his natural life, and after his decease that it shall be divided and held in the same manner and designation of persons as my other landed estate."

The plaintiff below then offered to prove by *Thomas M'Giffin*, Esq. and others, that the devise to *John Hoge*, in the will just read, was made in trust for the said plaintiff, and for that purpose offered to

give in evidence the declarations of the testator, made at the time of writing the will, to Mr *M'Giffin*, the witness, who was the scrivener, and again by subsequent declarations of *John Hoge*, the devisee named in the will; to which the defendants' counsel below objected, whereupon the court overruled the objection and admitted the testimony, to which opinion of the court the defendants' counsel excepted, and prayed the court to sign and seal a bill of exceptions, which was accordingly done.

Subject to the above exception, the plaintiff below gave in evidence the following parol evidence—first by

Thomas M'Giffin, who, being sworn, testified, that some time before the will of *William Hoge* was written, not many days, the testator told witness that he wanted him to write his will, not to help him to make it—that he would do himself; that he had intended writing it himself, but had neglected it until now, when his disease made it inconvenient for him to write. Testator spoke of this matter a second time to the witness; and some few days afterwards, when witness had called again to see the testator, he told witness it was now time to finish that business of which he had been before speaking to him. Testator then repeated to the witness the disposition which he wished to have made of his estate, and witness committed it to writings as contained in the will—read it over to the testator, who said it was right. Whilst the witness was writing the will, the testator, in speaking of the devise to his brother *John*, observed to witness, (though witness cannot recollect the precise words used by testator, but in substance said) as regards the devise to his brother *John Hoge*, it was a trust, and that he had no other way of doing it; he must leave it entirely to his honour, that he had full confidence in him. Testator named no person for whom the trust was intended. After writing the will, witness read it over to the testator, who was lying on his bed, very deliberately, clause by clause, and when done, testator observed, "That's the yarn, only you have converted a horse into a filly." Testator again repeated that the devise to his brother *John* was a trust, and that he had no other way of doing it, that he must leave it to his honour, and in that he had entire confidence. No words were used at the time by the testator to indicate the person for whom the trust was intended. On the evening of the day of the funeral of the deceased, after it was over, witness thinks, but will not be sure that it was at that time, he met with *John Hoge*, the devisee, in the street of Washington, when a conversation took place about his brother *William's* making his will. Witness stated to *John Hoge* what disposition the testator had made of his estate, and the devise made to himself, that is *John Hoge*, and also what the testator said at the time of writing the will, in regard to it, to which *John Hoge* replied, "that is intended for young *William Hoge*." *John Hoge* further said, that he had been a long time trying to get him to do it, but he had not the courage. *John Hoge* then went on to state the difficulties made by his brother, when he spoke to him on behalf

of young *William Hoge*, (meaning the plaintiff) and among other things, mentioned, that if it were given to him all at once it might do him more injury than good—that he could not in justice give him his personal estate, for that of right belonged to his wife, and as to his real estate, that he had got from his father, and wished it to continue in the family name. *John Hoge* also stated, that it was through him that the testator had been prevailed on to furnish or to pay for a horse, saddle and bridle, and some other things, as a military equipment for the plaintiff, then about going out on militia duty during the late war with England. That these things had been gotten, and finally he prevailed on the testator to pay for them. Witness had no subsequent conversation with *John Hoge* in relation to the trust, except what passed at the time of taking witness's deposition, which was intended to be read in evidence before arbitrators, to whom a former action of ejectment, brought by the plaintiff for the same property, had been referred. *John Hoge* then said that he considered that witness was in error as to his apprehension of some of the particulars referred to in the conversation first above had between them, and said witness must have confounded what passed at that time with other matters.

On the bringing of the former action, which was commenced against *Samuel Lyon*, witness stated that he received a few lines written by *John Hoge* to him, which lines were produced, and in which *John Hoge* states, that he had that day, to wit the 1st day of June 1820, been informed that the plaintiff had employed Messrs *M'Kennan* and *William Baird* to bring a suit against him for the land in dispute, and that he wished the witness and Mr *Campbell* to be counsel for him. In relation to the land, *John Hoge* stated to witness, that his brother *William* said it had come from his father, and he did not wish it to go out of the name or family of the male line, not certain which expression he used, but witness considered the one expression equivalent to the other. In the conversation with *John Hoge*, in reference to his brother's disposing of his property, witness understood him as alluding to a will; because in speaking of witness being appointed one of the executors of the will, *John Hoge* said that he had suggested that to his brother *William*. Witness understood *John Hoge* to have said, that when his brother spoke of the difficulties that occurred in making provision for the plaintiff, he (*John Hoge*) suggested to his brother to give it to him; but did not speak of a devise nor a will then; nor say in words that his brother had ever consented to do so. Witness has no recollection of *John Hoge's* telling him of any objections that the testator had in his lifetime to the plaintiff. Thinks the widow of the testator was married to Mr *Reed* in the fall of 1819. Some short time before her marriage with Mr *Reed*, witness asked Mr *John Hoge* if he would sell the property devised to him by his brother *William*, as he wished to purchase it. Mr *Hoge* answered he would. Witness found afterwards that he was unable to buy, and declined it. That the

trust was not mentioned or spoken of by either of them at any time when witness talked with Mr *Hoge* about buying the property.

John Graham sworn, and says: that on the evening after the funeral of *William Hoge*, *John Hoge* told him that his brother *William* had left his real estate to be divided into three equal parts, to *David*, *Jonathan* and himself. It is so long since, that witness cannot recollect distinctly: that one-third was left to him (*John Hoge*) in trust for young *William*. *John Hoge* said there were two points in which his brother had not done right; one was in cutting out the widow of her thirds when she married, and the other was something in respect to young *William;* but cannot say now what it was; whether it was that he had not left him enough, cannot say. *John Hoge* stated then that testator had not done as he ought to have done for young *William*.

Jacob Henry sworn, and says: that the last time he, witness, was over with *John Hoge* at his place above Georgetown, shortly after the death of *William Hoge*, witness went there to work for *John Hoge*. *John Hoge* took a copy of the will out of his pocket, and read it. He said it was not in the will, but he (*John Hoge*) was authorized to give it to young *William*; that he was not a lawful child. *John Hoge* talked about it several times, the same thing. He worked for *John Hoge* about his mill. Heard him say that one-third was given in the will to him, and he had it in his power to give it to young *William*. There was one time when *James Reed*, who is now dead, was present; nobody else present at any time. The plaintiff spoke to me long ago, about what I knew, in the life-time of *John Hoge;* but witness told him he might as well do without him. Plaintiff spoke to witness again about it, and after thinking on it, recollected all as well as ever. Witness heard *John Hoge* tell Mr *Grimes* about it. *John Hoge* did not say to *Grimes* that there was any thing in which his brother *William* had done wrong in his will in regard to his widow; mentioned nothing of the kind. Never heard him speak of it to any other person.

The deposition of *Joseph Pentecost*, who says: he never had any conversation with *John Hoge*, but once, on the subject of his brother's will. Shortly after the death of his brother, deponent asked if deceased had made any provision for young *William?* Mr *Hoge's* reply was this: that *William* wished him to give part of his own estate then, that is at the time of his death; but he refused to do it, alleging that young *William* might as well wait to the marriage or death of Mrs *Hoge;* as she was young she would outlive him, and he wanted the use of his own property. On cross examination: Did *John Hoge* state any thing that was offered to him in lieu of the property to be given by him to young *William?* Answer, No. The question he (deponent) put to *John Hoge*, relative to the provision made for young *William*, was in consequence of *John Hoge's* writing to deponent to take young *William* into his tanyard, and in consequence of knowing that Mr *Hoge* had been sending young *William*

to school, and he drew the inference that *John Hoge* was to get property from *William Hoge's* estate.

Andrew Swearingen's deposition. Some time after the death of *William Hoge*, he fell in company with *John Hoge* at his own house, and knowing that *John Hoge* was always a great friend to young *William*, felt anxious to know what the deceased had done for him by will. Mr *John Hoge* told me that he had not left him any thing. Deponent expressed surprise, as he had not heard of any other child. Mr *Hoge* told him that his brother was a great stickler for the name, and did not like to leave any thing out of the name, and mentioned that he had often urged his brother to do something very decent for young *William;* his brother said he wished to do so, but said the young man might die without heirs, and the estate would go out of the family; but there was an understanding between him and his brother, that if young *William* was to marry and get a male heir, that then he had it in his power, as he expressed it, to do something very decent for him. Mr *Hoge* and deponent never had any conversation after that on the subject. He has known young *William* from a child; his character good; and it was his opinion that deceased took notice of him when a child. He does not know that deceased ever gave him a cent, but *John Hoge* did, and put him in business, and was like a father to him.

George Morgan's deposition. Some time after the death of *William Hoge*, deponent had a conversation with Mr *John Hoge*, relative to the will of *William Hoge*. He stated the manner in which he had left it: one third of the real estate to himself in trust for young *William Hoge*; that this had been done by by his advice, or at his instance. Mr *Hoge*, as well as I can recollect, mentioned two reasons for this; the one he thought a wrong delicacy to Mrs *Hoge;* the other, in case of *William Hoge's* dying without issue before Mrs *Hoge's* marriage or death, it might go to his mother's branch of the family, which with his brother's family pride he could not bear; and as it came from his father, it should be retained in the name, and did not think it ought to change its channel. Mr *Hoge* mentioned that he wanted his brother to do more for him; but I think the amount of it was, that he replied it was sufficient. Mr *Hoge* then remarked that "with my brother I could go a certain length, but further he would not allow." I gave important employment to young *William*, in consequence of Mr *Hoge's* application; and I also saw letters from Mr *Hoge* to officers in the army, recommending young *William* to office, one of which was to major *Reed*. During the time young *William* was with me, he was lamenting his situation in life. I told him he ought to have patience; that he was well provided for, in at least Mr *John Hoge's* say so. He mentioned this frequently as a favourable trait in Mr *Hoge's* character, having a property left to him, and declaring it in trust for another, and also providing for a person in young *William's* situation. He had several conversations with Mr *Hoge*, and all went to the same point.

Young *William's* character good. That Mr *John Hoge* had advised his brother to provide for this young man, notwithstanding his birth. Young *William* depends on his own exertions for support. The business he gave him was the collection of 8000 or 10,000 dollars, and he did it with fidelity.

Plaintiff closed his testimony.

The defendants then gave the following evidence:

A deed of conveyance from *John Hoge* to *William Hoge*, son of *David Hoge*, dated the 24th day of August 1820, for the land in dispute, was read in evidence, and is in the following terms: "know all men by these presents, that whereas the late *William Hoge*, Esq. by his last will and testament, devised one third of his real estate in the county of Washington, Pennsylvania, to the undersigned, which devise, it is alleged and now believed, was in trust, with full power to select and grant the same to such of the male heirs of said testator, as he the undersigned might deem most worthy. And whereas, although it would be desirable to delay the execution or declaration of said trust for some time, on several accounts; yet, taking into view, the sudden and violent disorder to which the undersigned is subject, and by which he has more than once been brought in an instant to the brink of the grave, he deems it now proper to make the declaration and execute the trust aforesaid, especially as he is advised that *David Hoge*, Esq. of Steubenville, Ohio, who is the natural guardian of the selected objects of the trust, and who is of that age that promises a continuance of life, can be fully authorized to make any disposition of the property devised, not incompatible with the views of the testator. And whereas, expectations have been excited by alleged incautious conversations of the undersigned, held with various persons previous to any certain knowledge he had of the said devise being in trust, which cannot now be gratified, because the trust has been made known to him. And it is, therefore, proper to make a distinct declaration on the subject, lest after the death of the undersigned, these incautious conversations might be used for purposes never in his contemplation and adverse to the views of the testator. Wherefore, now know ye, that in order to promote and accomplish the views of the testator, I, the undersigned *John Hoge*, trustee as aforesaid, do hereby grant, bargain and transfer unto *William Hoge*, son of *David Hoge*, Esq. of Steubenville, in the state of Ohio, and his male heirs and assigns, the whole of my right, title, interest and estate, in the premises devised as aforesaid, with all the hereditaments and appurtenances thereunto belonging. To have and to hold the said premises to the said *William Hoge*, son of *David Hoge*, to the only proper use and behoof of him the said *William Hoge*, son of *David*, his male heirs and assigns for ever; subject, nevertheless, to a full and absolute power hereby reserved and granted to the said *David Hoge*, Esq., to have and enjoy during his natural life, the whole of the premises so devised, and also with full power and authority, if he should deem it proper and necessary,

to sell and dispose of or otherwise use the same for the education and advancement in life of his male children only, and particularly of the said *William*, his son. And I do hereby relinquish all power, control and interest in the property or estate devised to me for the purpose aforesaid. In testimony whereof, I have hereunto set my hand and seal, this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and twenty."

Acknowledged before *James Blaine*, justice of the peace of Washington county, Pennsylvania, the same day, and recorded the 29th day of the same month.

The deposition of *John Hoge* was next read in evidence, in which he testifies: that he is no way interested in the result of the suit brought by *William Hoge* against *Samuel Lyon*. That he never intended to profit himself by the devise made by his brother *William Hoge* to him, of one third of his real estate, and never felt any interest in it further than what is to be derived from the pleasure of bestowing on merit. That he knew that his brother *William* had the utmost confidence in him, and believes it was that confidence as well as affection, that induced his brother to make the devise, but he never could be certain from any information received from Mr *M'Giffin*, or otherwise, until he heard his testimony on the 12th of August 1820, that the devise to the deponent was in trust; and deponent therefore never could say that it was a trust estate for the use of any one, though he knows he did designedly insinuate something like it, as he had no fear that young *William* would or could claim all, especially as deponent knew that all aid had been repeatedly refused for him in the deponent's brother's lifetime. And as a trust had been spoken of in the country, deponent did apprehend that if others instituted an inquiry, that he might by some legal construction be obliged to exclude young *William* altogether, and therefore often said that one third of the devise to deponent was for him at any rate. But after Mr *M'Giffin's* offer to purchase, without mentioning the trust, all doubt on the subject vanished, and deponent never spoke or thought of a trust afterwards, because he believed if Mr *M'Giffin* would purchase, he had heard nothing which would militate against the views of the deponent; and until the testimony of Mr *M'Giffin* was taken before *James Blaine*, Esq. on the 12th, as before stated, the deponent believed that he had full power, whatever doubts might be entertained by others, over the estate; and that the confidence or trust reposed in him by his brother, was a confidence that he would dispose of the estate devised, in the same manner that he would of his other property, viz. to the most promising male or males of the family, for the establishment of a male branch or branches, and thus give a fixed habitation and preserve the name in the country. Under the persuasion that he, the deponent, was not limited by any trust, he had determined on the manner in which he would bestow the estate; which was, one third to young *William*, who now claims the whole as a trust estate; and the remaining two

thirds to his brother *David*, who had not been provided sufficiently for by his father, or otherwise such part of the two thirds to him as would enable him to educate his sons and fit them for the world, reserving any balance that might be to bestow on such one of his sons as should appear to him to merit most hereafter. With this view, deponent was much pleased with Mr *M'Giffin's* offer to purchase, not only because it would enable deponent to provide immediately for young *William*, but also because, in his mind, it did away the idea of a trust, of which there might be doubts, and which had been spoken of in the country. Such was the anxiety of deponent to provide immediately for young *William*, that when Mr *M'Giffin* declined to purchase, and the change of times forbade the prospect of a sale for money, he commenced operations to induce a wealthy merchant to purchase, and designed to offer to take one third of the price in goods, which he meant to bestow on young *William*, and credit the balance to suit the purchaser's convenience, and he engaged Mr *Campbell* to procure a division of the estate, that he might be enabled to close a bargain, if a purchaser offered for the land. That the deponent had taken young *William*, without education, character or friends, and fitted him for the world, and must feel for his comfort and prosperity in it; and the deponent was, therefore, sorry when he heard the testimony of Mr *M'Giffin*, relative to the trust, as it obliged him, against his will, to change his course and be bound by the wishes of the testator. These wishes the deponent must collect from a variety of conversations which he had with the testator, as he has no other direction on the subject. The deponent states, that his deceased brother *William* and himself were in the habit of the most friendly communication of opinion, and he never, on any occasion, omitted to press upon his brother the propriety and duty of doing something for young *William;* he even ridiculed the distinction between legitimate and illegitimate children; and the deponent declares that his brother never on any occasion consented to do any thing, except furnishing a horse, saddle and bridle, after he, the deponent, had succeeded in getting young *William* appointed to an office, which required a horse when called on a tour of militia duty. The deponent further states that he has spoken with different persons of the pains he took with his brother on the subject, and he finds by the testimony he heard on the 12th, that he has been very much misunderstood. Mr *Swearingen*, one of the witnesses, said, allowance ought to be made for him on account of the distance of time, his age and bad hearing; and the deponent must ascribe the gross mistakes of others to his blundering attempts to serve young *William*, and their inattention to his observations, for it might be unfair to ascribe their mistakes to a worse motive. The objections of the deponent's brother *William*, he states positively, were always against making any provision for young *William*, and not as to the mode of doing it; and the deponent could not say, with truth, that the deceased was willing to provide for him, for he was always un-

willing; and if it had not been for this unwillingness, deponent would have had young *William* provided for long before his brother's death. The deponent's brother often urged, in conversations had with him, when pressed hard, that young men did as well generally without patrimony as with it; that estates in prospect did great mischief; that, at any rate, he was not bound to do any thing, for, from the infamous character and profession of the mother, young *William* had as great a chance to be son of any one among twenty or more, as to be his; and that if there was no other reason, this last was sufficient—that he could not give money; and personal property such as he had, would be of no use; and that, in a word, he was determined to do nothing. And the deponent says positively, that his brother and himself never spoke of a devise to young *William*, nor to any other person, nor had he the most remote notion of his brother's death, or any prospect of outliving him, who was a very temperate man; nor did the idea ever enter deponent's head, that any of the conversations with his brother had any view to his death until after his will was made and he unable to converse much on any subject, when it occurred to deponent's mind that perhaps some of his brother's last observations relative to the division of estates, had that event in view. So far was the deponent from knowing of any thing intended to be comprised in his brother's will, that the first intimation he had of a will at all, or of being considered in it, was from *Andrew M'Clure*, after his brother's death, to whom the deponent immediately said he was glad of it, as it would enable him to provide for young *William* and others who had been neglected. The last conversation which the deponent had with his brother in relation to young *William*, or indeed on any other subject, was the day before he set out to Fayette county for merino sheep; and the same day he wrote for Doctor *Wilson*, of Steubenville, to attend his brother, about a week before his death. He was then in no apparent danger, but had no confidence in the physicians of Washington, and the deponent thought it best to have the aid of some one. Previous to this last conversation, deponent had on several occasions suggested the propriety of giving to young *William* a lot, and assisting him a little to sink a tanyard and commence business, being a tanner by trade; which, as the deponent has stated, his brother always refused to do. In this last conversation, only about a week before his death, the deponent suggested the giving to young *William* a piece of ground, at which deponent's brother became angry, and said, "Do you think I would give part of this estate to *Peg Treanour's* son; no, this I got from my father, and I have no right to divert it from the family." Deponent interposed, and assured him that it was a piece of out-land that was meant, which would suit for a tanyard for a beginner. He became cool, and said he had no land of the kind; but added, "As you appear to be so much interested on this subject, you had better give some land yourself." Deponent then answered he would,

if his brother would exchange some land with him or repay him in any way; and that if the deceased was unwilling, from any family cause unknown to deponent, to do any thing publicly for young *William*, and would authorize deponent and provide the means, that deponent would apply them sparingly, and only as the young man's merit would justify; but a devise, as stated by Mr *M'Giffin*, was not mentioned or thought of by deponent on this or any other occasion. Deponent's brother, on this last effort made for young *William*, pointedly refused to do any thing, as he had always done before, and begged that deponent would not introduce the subject again. This was about a week before his death, and when the deponent returned from Fayette, his brother's will was made without any concert with him, or the probability of having any; nor did his brother, either before or after the will was made, speak of it or say one favourable word of young *William*. There certainly was no trust in favour of young *William*, to the knowledge of the deponent; but on the contrary, as appears by the conversations stated, he was always excluded from any aid, sometimes with anger, and always with firmness, accompanied often with a denial of the relationship; and on this last occasion deponent was forbidden to mention his name again, and this, as is stated, about a week before the death of the testator. These things deponent certainly stated in part to Mr *M'Giffin*, perhaps confusedly and avoiding the strong objections his brother had to young *William*, because deponent was afraid of his exclusion, not of his taking all, in case the confidence in deponent, as expressed to Mr *M'Giffin*, by his brother, amounted to a trust in law. The terms of the trust could be known to no one but deponent, and as he did not then believe the confidence so expressed by his brother amounted to a trust, he did not think himself called on to state the strong objections of his brother to young *William*. And the deponent felt confident, as he did still until he heard Mr *M'Giffin's* testimony, that his brother did not mean to confine his power, but left him free to act as he would with his other property. The deponent states that his conversations must have been misunderstood, and have been consequently misrepresented. One error is, by ascribing his observations to his brother, and another great one is by supposing any of his conversations with his brother related to the final disposition of his estate, when they referred exclusively, so far as young *William* is concerned, to some small beginning for him. Deponent further states, that he is not surprised, when such a man as Mr *M'Giffin* misunderstood him, at the gross testimony of *Graham* and *Morgan*, to whom he might have said, before Mr *M'Giffin* offered to purchase, that if the devise made to him was in trust, one-third of it should go to young *William;* thus insinuating that the trust was for him; but more the deponent did not say, and never on any occasion went further than insinuation in favour of young *William*, as this deponent thinks and believes. The appointment of Mr *M'Giffin* as an executor, would seem from the testimony to be the result

of a recommendation made by the deponent to his brother of Mr *M'Giffin* as such, than which nothing can be more untrue; when it may be true that the deponent indirectly contributed to it, and may have said so, but if he did, it was by his constant recommendation of Mr *M'Giffin* to his brother and others, as a young man of honour, who promised well; and if Messrs *Cook* and *Huston* were dead before his brother, Mr *M'Giffin* being executor for them, at least one of them, by deponent's advice, might have been mentioned by him in conversation to his brother, but he never could have suggested Mr *M'Giffin's* name in any other way, because deponent and his brother never spoke of a will, nor did deponent know that his brother intended to make one.

The deponent further states, that he recollects the conversation he had with Mr *M'Giffin*, in which it is alleged that the trust was mentioned, and now positively declares that he heard no such expression, whatever Mr *M'Giffin* may have said or intended to say. If a trust, in words, had been mentioned and heard, the deponent would have attended to it, because it would have defeated his private object of providing for young *William*. Deponent minds Mr *M'Giffin's* words on that occasion. They were these, he said, when the deponent's brother mentioned the devise to him, there was a pause, that he, Mr *M'Giffin* looked at deceased and said, "What, is there nothing more? no, was the answer, I have full confidence in my brother *John*;" and deponent now avers that this is all he heard of the trust from Mr *M'Giffin* until he heard his testimony. The deponent states, he understood the confidence as above expressed, referred to his conversations with his brother on the policy of Pennsylvania, and he is sure if he had heard the word "trust" mentioned, he would have recollected it, because he immediately revolved in his own mind, whether he could not gratify his wishes in relation to young *William*, and yet substantially comply with the expectations of his brother, especially if *William* should have male issue. The many conversations which deponent had with his brother, from which any limitations to his power over the estate can be inferred, relate principally to the policy in Pennsylvania of dividing estates, which both disapproved of, as calculated to destroy or prevent the establishment of a national character; and deponent and his brother both concurred in the opinion, that national character could not be established without the preservation of family name, which only could be preserved by giving the real estate to the oldest son, and providing for the other brothers in the navy, army, learned professions or manufacturing establishments; and at all events, the real estate should never go to the females. This was a favourite topic with him, and deponent and his brother never met latterly but it was mentioned. It was the principal theme of conversation the last time deponent had any with his brother, and when deponent was about leaving him, he followed deponent to the room door, and asked with earnestness if "we understood each other on that subject?"

The deponent assured him that he had spoken his mind freely and without disguise, when his brother said, "Then I am satisfied," and deponent left him to go to Fayette, and did not see him again until after his will was made, and he on the very verge of life. The deponent believes that these conversations on the subject of estates, inspired his brother with confidence in him relative to the final disposition of the estate; and though the devise may be a trust in law, and must be so considered on Mr *M'Giffin's* testimony, yet the deponent believes the design of the testator was to leave the selection of the object of the bounty to his choice, as character should be unfolded, having confidence that he would select such one or more of the males who promised the fairest to continue the family name; and hence it must be that the testator said to Mr *M'Giffin*, "that it could be done in no other way, and that he had full confidence in his brother *John*;" for it is futile to suppose he referred to young *William*, as deponent was the trustee, to whom he had rejected every proposition for aid to the young man. Deponent further says, that his brother never offered any exchange of property with him, and Mr *Pentecost's* testimony must refer to an application to him by young *William* to purchase a tanyard then to be sold near Wheeling, which deponent told *Pentecost* he could not spare money or property to make, and that the young man must wait the death or marriage of Mrs *Hoge*, when he meant to give one third of the devise to him. The deponent states again, that there was no trust, or understanding between his brother and him, favourable to young *William*; but on the contrary, all aid was absolutely refused. That deponent now believes that his concealment of his brother's conversations relative to young *William*, when coupled with deponent's insinuations that he was provided for in the will, has contributed in some degree to the testimony given, and, for want of due confidence, has caused the present suit; and deponent can only justify himself from his strong wish to serve young *William*, and his impression that the devise was not a trust, whatever the law might make of it; but it now appears it was a trust reposed in him by his brother, in confidence that he would attend to a family establishment, which his brother discovered could not be done by himself, as he was about to be cut off before the characters of his nephews were developed, and therefore, as he told Mr *M'Giffin*, it could be done in no other way.

David Morris was affirmed; and testified: that very shortly after the death of *William Hoge*, his brother *John* came to affirmant's house, when affirmant asked *John Hoge* if his brother *William* had made a will; he replied that he had, and had given one third of his real estate to his brother *David's* male heirs, another third to his brother *Jonathan's* male heirs, and the remaining third to himself. Affirmant then inquired if he had left nothing to his son *William* (the plaintiff). He said he had not; that he had often solicited his brother *William* to give young *William* something, but he had always refused and persisted in it till the last. This was the first

time that I saw *John Hoge* after the death of his brother; it was but a few days after his death; within a week any how.

The defendants then gave in evidence the record of an action of ejectment, commenced in the court below, to April term 1820, by the plaintiff, against *Samuel Lyon*, then tenant in possession of the land in dispute, which was referred to arbitrators mutually chosen by the parties, and on the 29th of August 1820, was discontinued by the plaintiff.

The defendants gave in evidence a deed of conveyance and release from the plaintiff and his wife, dated August the 29th 1820, to *David Hoge*, in the following words, to wit: "this indenture, made and entered into, between *William Hoge* and *Sophia* his wife, of the borough of Washington, county of Washington, and state of Pennsylvania, of the one part, and *David Hoge*, of the borough of Steubenville and state of Ohio, of the other part, witnesseth—that the said *William Hoge* and *Sophia* his wife, for and in consideration of 3000 dollars, to them in hand well and truly paid, by the said *David Hoge*, the receipt whereof is hereby acknowledged, have remised, released, granted, bargained and sold, and do hereby grant, bargain and sell, remise and release, and for ever quit claim, unto the said *David Hoge*, his heirs and assigns for ever, all the right, title, interest or claim of them, the said *William* and *Sophia*, of, in or to all and every part of the real, personal or mixed estate of the late *William Hoge*, brother of the said *David*. To have and to hold the premises hereby granted and released, or intended to be so granted and released, unto the said *David Hoge*, his heirs and assigns for ever, together with all and singular the buildings, rights or appurtenances thereunto belonging or appertaining. And the said *William* and *Sophia* his wife do hereby covenant to warrant and defend the same, to the said *David Hoge*, his heirs and assigns, against them, the said *William* and *Sophia*, their heirs and assigns for ever. In witness whereof the said *William* and *Sophia* have hereunto set their hands and seals, this twenty-ninth day of August, in the year of our Lord one thousand eight hundred and twenty."

Acknowledged the same day before *James Blaine*, a justice of the peace, and recorded on the same day.

A bond which had been executed at the same time with the deed of conveyance last aforesaid, and bearing even date therewith, by *David Hoge* to the plaintiff, in the sum of 8000 dollars, conditioned for the said *David Hoge's* conveying in fee simple to the said plaintiff four hundred acres of land, situated on Cool Spring Creek, or the waters thereof, above *Benjamin Stokely*, in the county of Mercer and state of Pennsylvania, so soon as a selection thereof and survey should be made by the said plaintiff, or within a reasonable time thereafter, attested by *Parker Campbell* and *T. M. T. M'Kennan*, was given in evidence.

The condition of this bond had been performed by *David Hoge*, taken up by him and cancelled. A certified copy of the deed of con-

veyance, which had been executed by *David Hoge* and *Jane* his wife, to the plaintiff, dated October 4th 1821, in fulfilment of the condition of said bond, whereby the said four hundred acres were conveyed in fee simple to the plaintiff, was then read in evidence.

A certified copy was then given in evidence, of a deed of conveyance in fee simple, from the plaintiff and his wife to *William Zahniser*, dated the 22d day of November, A. D. 1821, for one hundred and twenty-five acres and thirty perches, part of the aforesaid four hundred acres—consideration 500 dollars and 75 cents; as also a certified copy of a deed of conveyance from the plaintiff and wife, conveying the residue of the said four hundred acres to *William North*, in fee simple, for the consideration of 440 dollars, and dated the 18th day of March 1822.

These deeds were all recorded in the recorder's office of Mercer county, Pennsylvania.

Thomas M. T. M'Kennan, Esq. then testified that he and *William Baird* were counsel for the plaintiff in the former action of ejectment brought for the land in dispute. That that suit was compromised, and that the deed of conveyance and release read in evidence, from the plaintiff and his wife to *David Hoge*, and the bond aforesaid, given by the said David to the plaintiff, were given and executed in pursuance of the agreement of compromise, which then took place between them in relation to the land in dispute, and that the former action of ejectment was discontinued also in pursuance thereof. The compromise was made upon a trial of the cause before arbitrators, and after the testimony, as witness believed, had been gone through on both sides. The compromise was made between the parties with the approbation of the counsel of both sides.

The defendants' counsel requested the court to charge the jury upon these points. 1st. That the devise of one-third of the real estate of the testator, *William Hoge*, being given to *John Hoge*, in fee simple, absolute, and without any trust being mentioned in or on the face of the will itself, it cannot be established by the declarations or communications of the testator to the person who drew the will, that it was a trust; but that he must leave it to the devisee to dispose of it, as he had confidence in him, and did not say for whom the trust was designed; nor can a trust in connexion with such declarations of the testator be established by the subsequent declarations of the devisee in the will, made after the death of the testator, that it was given to him in trust for the plaintiff.

2. That a trust cannot be created and established contrary to the face of the will, by the parol declarations of the testator, or the parol declarations of the devisee named in the will, or by both in conjunction.

3. That every devise to the person named in the will, imports a consideration; and, therefore, no averment contradicting the idea that the devise was not intended exclusively for the benefit of the devisee so named, can prevail or defeat the devise in the will.

4. That the plaintiff, although he may be an illegitimate son of the testator, is, notwithstanding, to be considered as a mere stranger: that no such relationship existed thereby, as could either in law or equity form a good, much less a valuable consideration; and that, had the testator, or *John Hodge* the devisee named in the will, made a contract without other consideration, to convey the land in dispute to the plaintiff, it would not avail or give the plaintiff any right to the land.

5. That if the plaintiff even had any equitable claim to the land in dispute, any unreasonable delay on his part to prosecute the claim, will in equity, as well as law, be sufficient to defeat it.

6. That the compromise made in this case, during the pendency of the former action of ejectment, by the plaintiff, for the land in dispute, by which that action was discontinued by the plaintiff, and the plaintiff released his claim thereto to *David Hoge*, is a bar to the plaintiff recovering the land in this action, if fairly made without any fraud committed by *David Hoge* on the plaintiff.

7. That the compromise will be good and binding on both parties, even if it should be that the party releasing his right had the better title. It is sufficient that there was a real dispute.

8. If the plaintiff has received a conveyance, and a title thereby to four hundred acres of land in Mercer county of this state, on the faith of the compromise, and as a part of the agreement of the compromise itself, were the compromise even void on account of fraud, the plaintiff could not rescind and set aside the compromise for that reason, without reconveying and reinvesting *David Hoge* with the title to the land, so conveyed by the said *David Hoge* to the plaintiff, and that without this being previously done by the plaintiff, he cannot recover the land in dispute in this action.

9. Unless fraud has been proved to have been practised by *David Hoge* upon the plaintiff, in making the compromise, it is good and binding upon the plaintiff, and bars him of this action.

10. That even supposing *John Hoge* had perjured himself in the testimony which he gave before the arbitrators, by whom the former action of ejectment brought for the land in dispute was to be tried, and *David Hoge* had no knowledge or reason to believe that it was so, that would not avoid the agreement of compromise; that the plaintiff would be bound by it, and barred by it from recovering in this action.

11. That if such perjury would be sufficient to avoid the agreement of compromise, yet it could not be done without putting *David Hoge* in the same state and condition that he was in at and before the time of compromise, by restoring to him the land in Mercer county, which he conveyed to the plaintiff in pursuance of the agreement of compromise.

The plaintiff requested the court to charge the jury: 1. That the defendant, taking under *John Hoge* as a volunteer, stands in his

shoes, and consequently, if *John Hoge* was a trustee for the plaintiff, the defendant is a trustee also.

2. That if the jury believe that the release made to *David Hoge* by the plaintiff, was obtained through the misrepresentations of *John Hoge*, and in consequence of the influence of his testimony, and the persuasion of the arbitrators, it is not binding.

3. That if the release was procured or induced by the fraud, falsehood, imposition or influence of *John Hoge*, it is void, however innocent *David Hoge* may be.

4. That if obtained through oppression, in consequence of the plaintiff being so oppressed with his situation that he was glad to make any terms, it is not binding; and that great inadequacy of price is evidence of oppression, and that the mere absence of fraud is not sufficient to sustain the release.

5. That fraud may be inferred from the nature and circumstances of the transaction, and the connexion of the parties.

6. That if the compromise was obtained or brought about by the fraud or undue influence of any one, it is not binding.

The court charged the jury—

This is an action for one undivided third part of a tract of land in Canton township, adjoining the borough of Washington. It is admitted that the late *William Hoge*, Esq. was owner of the land. He made his will, (*prout* will), in which he devised one third part to the male heirs of his brother *Jonathan Hoge*, deceased, one third part to the male heirs of his brother *David Hoge*, and the remaining third to his brother *John Hoge*. This last is the part in dispute. Both parties claim under this devise. The plaintiff alleges that the testator intended this part of his estate for him, he being his illegitimate son; and that the devise to *John Hoge* was in trust for his benefit. It is contended, on the other hand, that if there was a trust, it was in confidence that *John Hoge* should select some one as the recipient of the benefit, in conformity with the known views and wishes of the testator in relation to the transmission of the estate to support the family name, &c. Defendant claims that *John Hoge* has discharged the trust, by conveying to him, &c.

For reasons which are known to the counsel, it is not our intention to remark at all upon the facts of this case. We shall leave them entirely to you, and confine ourselves to a brief notice of the legal points submitted on both sides. It is a matter of regret that we have not had time to examine in a satisfactory manner the many important principles involved. We are relieved, however, by the reflection, that our errors will be corrected by the superior tribunal to which it will no doubt be removed.

1st point submitted by plaintiff. Answer. The defendant taking under *John Hoge*, stands in his shoes; and if *John Hoge* was a trustee for plaintiff, the defendant must be so also. He is not a purchaser for a valuable consideration without notice. (Deed from *John Hoge* to *William Hoge*.)

1st, 2d, and 3d points submitted by defendant's counsel. Answer. The devise of one third of the real estate of the testator *William Hoge*, being given to *John Hoge* in *fee simple* absolute, and without any trust being mentioned in or on the face of the will itself, it cannot be established by the declarations and communications of the testator to the person who drew the will, that it was a trust, but that he must leave it to the devisee to dispose of it. He had confidence in him, and did not say for whom the trust was designed. We think, however, that in connexion with such declarations of the testator, the subsequent parol declarations of the devisee, clearly and distinctly expressed after the death of the testator, that it was given to him in trust for the plaintiff, may establish such trust, if fully proved and believed. That though a trust cannot be created and established contrary to the form of the will, by the parol declarations of the testator, or by the parol declarations of the devisee, separately and alone considered; yet both of them in conjunction, if proved, may establish such trust. No averment can be allowed to defeat a will; but the question here is, what was the will of the testator?

If you find, from the parol declarations of the testator, and the parol declarations of the devisee, which we have allowed in evidence, that *William Hoge*, the testator, did intend that the devise to *John Hoge* should be for the use and benefit of *William Hoge* the son—we say that such is the will of *William Hoge* the testator, and it would be fraud to defeat it, and *John Hoge* would hold as a trustee.

4th. To the fourth proposition of the defendant, we answer generally in the affirmative. If, however, the plaintiff was acknowledged by the testator to be his illegitimate son, he was under a moral obligation to provide for his support and advancement. This may be regarded in arriving at his intent. It would be a good consideration for a devise.

5th. We say that if the plaintiff ever had an equitable claim to the land in dispute, any unreasonable delay on his part to prosecute the claim, will, in equity as well as law, be sufficient to defeat it. We do not say, however, that such unreasonable delay existed in the present case as will prevent the plaintiff recovering.

6th. The compromise made during the pendency of the former ejectment by the plaintiff for the land in dispute, by which that action was discontinued, and the plaintiff released to *David Hoge* his claim, we think is a bar to the plaintiff recovering the land in this action, if fairly made, without any fraud practised by *David Hoge* or (any one with his privity), or any undue advantage taken of the plaintiff's ignorance, mistake or necessities.

7th. The compromise will be good and binding on both parties, even if it should be that the party releasing his right had the better title. It is sufficient that there was a real dispute; not a mere pretended and colourable defence.

Answer to second, third, fourth, fifth and sixth points of plaintiff, and ninth and eleventh of defendant. But should you suppose that

the release made to *David Hoge* (*prout* release) by plaintiff, was obtained through the misrepresentation of *John Hoge*, and in consequence of the influence of his testimony and the persuasions of the arbitrators, it is not binding, if *David Hoge* knew of such misrepresentation, and availed himself unduly of such influence and persuasions.

Again, should you find that the release was procured or induced by the fraud, falsehood, imposition or influence of *John Hoge*, it is void, however innocent *David Hoge* may be, if the agency or interference of *John Hoge* was employed to effect the arrangement. But if *David Hoge* knew of no such misrepresentation, nor had unfair advantage from such influence and persuasions, if he was not privy to any fraud, falsehood or imposition on the part of *John Hoge*, nor had his interference in effecting the compromise, even supposing *John Hoge* had perjured himself in the testimony which he gave before the arbitrators, and *David Hoge* had no knowledge or reason to believe it was so, the agreement of compromise will not be avoided. The plaintiff would still be bound by it.

The circumstances of the plaintiff at the time the release was given, will not render it invalid, unless you find that *David Hoge* took advantage of his embarrassed situation to drive an unconscionable bargain, contrary to justice and fairness. In such case the mere absence of actual fraud is not sufficient to sustain the release. In determining the question of fraud, the nature and circumstances of the transaction, and the connexion of the parties, may be regarded. Gross inadequacy of price may be evidence, connected with other circumstances, of overreaching.

8th and 11th of defendant. If the plaintiff has received a conveyance and a title thereby to four hundred acres of land in Mercer county, upon the faith of the compromise, and as a part of the agreement, and the compromise were void on account of fraud in the perjury of *John Hoge* at the trial of the former ejectment; yet the plaintiff cannot rescind and set aside the compromise, without placing *David Hoge* in the same, or as good a condition, as he was at and before the agreement, by restoring to him the land in Mercer county; or, if he has disposed of that before the discovery of the fraud or perjury, so as to put it out of his power to convey, by paying to him the fair value thereof. This must be done before he can have the land in dispute. But if you should find for the plaintiff, on the other points of the case, you can make provision in your verdict for the security of *David Hoge* in this particular.

After this charge of the court, the jury found a verdict for the plaintiff, possession to be delivered on payment or tender in cash of 940 dollars and 75 cents to the defendant; upon which the court below rendered a judgment.

Assignment of errors.

1. The court below erred, in receiving the parol evidence, which went to alter and contradict the will of the testator, *William Hoge*.

2. In charging the jury, that, as to the question, what was the

will of the testator? they were to decide it from the writing in connexion with the verbal declarations of the testator, and of the deviseee, *John Hoge*, named in the written part.

3. In charging the jury that the circumstance of the plaintiff below, being reputed the bastard son of the testator, was a sufficient consideration to raise and support a trust in real estate, created by words merely spoken and not reduced to writing.

4. In telling the jury that the court would not say that the delay of the plaintiff below to prosecute his claim, which at most could not be called more than equitable, was a bar to his recovery, when it ought to have said so.

5. There is error in the answer of the court below to the sixth point proposed by the defendants then to be answered for the instruction of the jury; it is vague and ambiguous, especially in the following words, "or any undue advantage taken of the plaintiff's ignorance, mistake or necessities," without saying whether ignorance or mistake of the facts or the law was meant; and therefore calculated to mislead the jury.

6. The court omitted to answer the ninth point of the defendants below.

7. The court erred in telling the jury, that if they should find for the plaintiff below upon the other points beside that of reconveying the land in Mercer county, that they might, notwithstanding no reconveyance had been made or tendered by the plaintiff below to *David Hoge*, find for plaintiff; but make provision in their verdict that the plaintiff should not obtain possession of the land until a reconveyance of the Mercer land should be made, or the value thereof tendered or paid by the plaintiff to the defendants.

8. The court erred in rendering judgment for the plaintiff below, instead of for the defendants.

W. W. Fetterman, for plaintiff in error.

As to the first error assigned: I take it to be well established and fully settled, that no averments can be allowed or parol evidence admitted, to alter, vary, contradict or explain a will in writing. In *Cheney's* case, 5 *Coke* 68, Sir *Thomas Cheney*, by his will in writing, devised to *Henry* his son divers manors, and to the heirs of his body, the remainder to *Thomas Cheney*, of Woodby, and to the heirs male of his body, on condition "that he or they, or any of them shall not alien, discontinue," &c. It was offered to prove by witnesses that it was the intent and meaning of the devisor to include his son and heir within these words of the condition "*he or they*," and not only to restrain *Thomas Cheney*, of Woodby, and his heirs male of his body: but it was resolved that the testimony could not be received, "for the will concerning lands, &c. ought to be in writing, and the constructions of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of

great inconvenience, that none should know by the written words of a will, what construction to make or advice to give, but it should be controlled by the collateral averments out of the wills. So in the case of *Brett* v. *Rigden, Plowd. Rep.* 345, it was unanimously agreed by all the justices, that where the testator had devised his lands to B and his heirs, who died in the lifetime of the testator, who after the death of the devisee told C, the son and heir of B, in the presence and hearing of many witnesses, that he, the said C, should be heir to him the testator, and should have all the lands which B his father should have had by his last will and testament, in case he had survived him, (the testator) "was of no effect in law, and no regard ought to be given to it; inasmuch as it was not written in his last will. For the statutes of 32 and 34 *Hen.* 8, give liberty and authority to every one to devise his lands by his last will and testament in writing." In which case, *all that can make the devise effectual ought to be in writing.* "And if the rest which is in writing, is not sufficient to make the lands pass without the words spoken to *Thomas*, (that is C) the son, then it follows that the substantial matter, which would make the land pass, is not written, but rests in words only, and is not within the statute, for no will is within the statute but that which is in writing; which is as much as to say that all that is effectual, and to the purpose, must be in writing, without seeking aid of words not written." *Godolph. on Leg.* 52; *Gilb. on Devises* 90; 6 *Cruise's Dig.* 1934; *Cases* 39, 40, 41, 42 and 43.

The deposition of a person who prepared a will was offered to be read, to prove the declarations of the testator at the time he gave the instructions for his will, respecting his intention of giving his wife the several devises and bequests mentioned in the will, *over and above her* jointure, but Lord *Bathurst* would not suffer such evidence to be read. 1 *Cruise's Dig. tit.* 7, *ch.* 3, *sec.* 12, *page* 248; *Broughton* v. *Erington*, 7 *Bro. Par. Ca.* 12. This last case was taken to the house of lords, and the decision of the chancellor there confirmed. See also the case of *Towers* v. *Moon*, 2 *Vernon* 98. So in the case of *Ulrick* v. *Litchfield*, 2 *Atk.* 372. *Mary Parivicine* gave her real and personal estate to the plaintiffs, equally between them; and on the death of one of them, the whole estate of *James Ulrich*, in tail; and for want of such issue to *Richard Ulrich* in fee, with a few pecuniary legacies, and charged her real estate with the payment, if the personal estate should not be sufficient, and by *her will declared she gave all the rest and residue of her personal estate to her uncle Leonard Collard's three daughters.*

The counsel for the residuary legatee offering to read the parol testimony of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of *Leonard Collard*: Lord *Hardwicke* said, "I am of opinion it is not a case in which parol evidence can be read, and would be of dangerous consequence; it is true there are some things here which would make a judge wish to admit it; but I must not follow my inclina-

tions only, for I do not know that upon the construction of a will, courts of law or equity admit parol evidence, except in *two cases:* first, to ascertain the person when there are two of the same name, or else when there has been a mistake in the christian name or sirname, and this upon an absolute necessity, as in Lord *Cheney's* cases, where there were two sons of the name of *John*, 5 *Co.* 68, and if the court had not let in such evidence, it would have made the will void, notwithstanding there was such a person as *John*, &c. and the doubt was only which of them was meant; and notwithstanding too the heir at law was already disinherited. The second is with regard to resulting trusts relating to *personal estate.* When a man makes a will and appoints an executor with a small legacy, and the next of kin claims the residue. In order to rebut the resulting trust for the next of kin, parol evidence was admitted to ascertain the person who was to have the residue, in the case of *Littleburg* v. *Buckly*, *Eq. Ca. Abr.* 235, and the *Countess* v. *The Earl of Gainsborough*, 230.

Likewise in the case of *Brown* v. *Selwyn*, *Ca. temp. Talbot* 240, *John Brown* devised the residue of his real and personal estate, not before devised, to his two executors, &c. One of them is indebted by bond to the testator. Held, by Lord Chancellor *Talbot*, that this bond debt is not released thereby, but shall be divided between them, and no parol evidence shall be admitted, that the testator intended to release it to the obligor, and had given instructions for that purpose to the attorney who drew his will. This decree was affirmed in the house of lords, where they would neither allow the parol evidence, nor the respondent's answers to be read as to this point. See *Ca. temp. Talbot* 240, 243, 244; *Bro. Par. Ca.* 179.

Also, in the case of *Torbert* v. *Twining*, 1 *Yeates* 432. It was decided by the supreme court of this state, that parol evidence is inadmissible to *supply*, *contradict* or *explain* the written words of a will. In this case the testator, *David Twining*, had, by his will, dated the 25th of October 1791, devised, *inter alia*, considerable real estate to his daughter *Beulah* (wife of *Torbert* and one of the plaintiffs). And afterwards, on the 12th of November 1791, by codicil thereto, devised as follows—"*Item:* Whereas I have given in my last will all my lands that are not already bequeathed unto my daughter *Beulah Torbert*, for and during her natural life, with all the rents, issues and profits; but on further consideration of it, I do give all the lands and tenements and appurtenances, thereunto belonging, unto my loving brother, *Jacob Twining* and friend *Thomas Story*, in trust for the use, benefit and behoof of my daughter *Beulah Torbert*, for and during her natural life, they, or the survivor of them, to rent out, in the best manner they can, *so that no waste is made of the timber*, and the best care that can be to preserve the land *from abuse by extravagant tillage.* She, my said daughter *Beulah*, to have *all the rents, issues and profits* ensuing from the aforesaid plantation, for and during her natural life, and at her decease I do give the aforesaid plantation unto the *male heir* or *male heirs* of her body, &c." Depositions were agreed to be made

part of the case, which went to show that the testator declared in his last sickness, that his intention in making the codicil was, that the real estate therein devised to his daughter *Beulah*, should be *for her sole and separate use:* and, after he had made his codicil, he declared that he expected he had effected his purpose, and that her husband could not intermeddle with it. Now in this case it was manifest from the written will, as well as the codicil, that his daughter was the particular and special object of the testator's bounty, and the moving cause of the devise, yet the court would not admit the parol evidence, which certainly did not contradict this idea, but because it would have excluded her husband from all participation in the enjoyment of the devise, and have changed the legal effect of a devise to her use generally, the court felt themselves bound to reject it. To have received and given effect to such testimony, would have been to have made it part of the testator's will; and although not in writing, to have regulated and restricted the enjoyment of the testator's real estate at his death. This would have been in direct contravention to our statute on the subject of wills.

The first section of the act of 1705, *Purdon's Dig.* 800 (edit. 1824), provides that "all wills in writing, wherein or whereby any lands, tenements or hereditaments within this province, have been or shall be devised, being proved, &c., shall be good and available in law, for the granting, conveying and assuring of the lands or tenements thereby given or devised, as well as of goods and chattels thereby bequeathed." The 3d section, page 801, declares that "no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by *two or more witnesses*, who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect, &c." And by the fourth section it is further provided, that no testimony shall be received to prove any nuncupative will, if more than six months shall have elapsed after speaking the words, unless it, or the substance of it, was committed to writing within six days after the making of the said will.

Again, by the sixth section, "no will in writing, concerning any goods or chattels or personal estate, shall be *repealed*, nor any clause, devise or bequest therein be *altered* or *changed* by any *words*, or will by word of mouth only, &c."

According to this statute a will, in order to *pass real estate, cannot be made by word of mouth, under any circumstances.* Nor can it as to *personal* estate exceeding in value thirty pounds, unless done in the testator's last sickness, and after his death *proved by two witnesses at least*, who were required at the time to take notice that such was his will. And unless it be reduced to writing, within six days after the speaking of the words, no proof whatever can be received or admitted of it more than six months thereafter. Seeing the legislature have been so particular in respect to the admission of evidence, to

establish a nuncupative will, can it be imagined that they could have conceived that it would ever be attempted in the case of *real estate?* Even in the case of a will of personal estate, reduced to writing, they have expressly forbidden the *repeal* of it, or the *alteration* of a *single clause* in it, without committing it to writing. Yet, in the present case, the declarations of the testator *William Hoge*, made to *Thomas M'Giffin*, who drew the will, have been received in evidence to prove what! That the devise to *John Hoge* and *his heirs and assigns* was not intended for his use or benefit, although so expressly declared on the face of the will, but for some other person or persons. The admission of such testimony is in opposition to every principle of the common law; to the express provisions of the statute; to the decision of the courts of England, and of our own state on the subject. It is difficult to conceive a case, where the idea of a trust would be more incompatible with the devise contained in the will than the present. It must be observed, that the devise to *John Hoge* is an estate in fee simple. Now, who ever thought of *devising* an estate to a man and his heirs and assigns, who was designed to be a mere trustee? I must say that at this moment I have no recollection of such a case. How incredible! Yet let it come to the ears of jurors whose feelings have been excited and prepared in a particular way, and it is not only credible, but reasonable, just and righteous. Under some such sentiment the imaginations of witnesses are set to work, and fancy supplies the place of recollection, and it becomes impossible to calculate the consequences. Hence the danger in admitting such testimony at all.

In the case of *Duncan* v. *Duncan*, 2 *Yeates* 202, where a rough draft of the will in the testator's own handwriting was offered in evidence to show, from a clause or expression contained in it, and left out of the will that was executed, that a devise in favor of the widow was intended to be in lieu of dower, it was rejected by the court, who declared that "the will must be judged of *ex visceribus suis.*"

Again, in the case of *Sword* v. *Adams*, 3 *Yeates* 34, *Penelope Haley* had, *inter alia*, devised a house and lot in Philadelphia to her granddaughter *Mary Thompson, her heirs and assigns.* The granddaughter died in the lifetime of the testatrix; who, when she heard of the death of *Mary* her granddaughter, was desirous of providing for the event which had taken place, and to make a codicil to her will for the purpose of giving the property, which had been devised to the granddaughter *Mary Thompson, her heirs and assigns*, to an only child and son named *James*, which the granddaughter had by a Mr *Sproat* to whom she had been married, but was prevented by Dr *Nathaniel Dorsey, who was married* to another granddaughter of the testatrix, and by his wife entitled to one-ninth part of the estate of which the testatrix should die intestate. He informed the testatrix (though without any ill design) that as she had devised to her said granddaughter *Mary Thompson, her heirs and assigns*, that her son *James* must necessarily inherit the same, and that he completely

answered the description of *her heir*. With these assurances, her mind was quieted, and she prepared for death without making any further alteration in her will. In addition to this parol testimony, the nuncupative will of the testatrix, which had been proved and established by two witnesses, showed her intention beyond all question. It was also deposed to by other witnesses, that they, not long before testatrix's death, heard her say that, in case of her granddaughter *Mary Thompson's* death, she intended the property for her child, and that it was secured to *them*. The court decided, though with great feelings of regret, that the parol evidence could not be received. They say "the case is perfectly clear at law, however hard it may bear on the infant *James Sproat*. *Private inconvenience must give way to the safety and security which must be the result of general principles long settled and sanctioned.* We have no hesitation in saying that the plaintiff is entitled to a verdict."

In the case of *Iddings* v. *Iddings*, 7 *Serg. & Rawle* 3; it was decided, that parol evidence is not admissible to show that a scrivener, in drawing a will, inserted words, of the meaning of which he was ignorant, in order to vary the effect of the dispositions contained in it, although it may be received to explain a latent ambiguity, or to rebut a resulting trust, or, *in case of fraud or mistake to annul the will.* The opinion of the court in this case is delivered by the late chief justice, who, after vindicating the propriety and justice of the rule that excludes parol evidence in such cases, with great force and perspicuity notices the only exceptions to it, and the reason of them. The last of which is in the case of fraud: he says parol evidence is admitted "not for the purpose of *explaining* or *altering* the writing, but of showing it to be *void*. If, instead of the will which a man has read and intends to execute, another is substituted which he executes, it is evident that this is not his will, and proof of this fraud is permitted. So, I apprehend, the truth might be shown, if, by *mistake*, the wrong paper was executed and the testator died before there was time to correct the error." Now, the plaintiff's counsel below does not pretend that he is entitled to the benefit of the parol testimony, under any of the exceptions to the general rule established on this subject except that of fraud; but if it were to be admitted on this principle it could not entitle the plaintiff below to recover; for according to Chief Justice *Tilghman* in the case above, the effect of it would not be to *change* or *alter* the devise in the will to suit his wishes, but to *avoid* it, which must necessarily set all colour of claim on his part aside.

I would also refer to the case of *Mann* v. *Mann*, on this subject, in 1 *Johns. Ch. Rep.* 231, where the principles and cases upon and in which parol evidence has been admitted, are very fully and learnedly set forth by Chancellor *Kent*. See also the opinion of Chief Justice *Thompson*, in *Mann* v. *Mann*, 14 *Johns.* 14, and also 11 *Johns.* 205; *Jackson* v. *Sill*, 8 *Mass.* 506, and *Smith* v. *Fenner*, 1 *Gallison* 172. I contend that the admission of the parol evidence in

this case was not only in violation of the true spirit and meaning of the statute of this state against frauds and perjuries, but more especially in direct contravention to the statute regulating wills for devising real estate. Although I admit that, by many decisions of courts, the statute of frauds and perjuries has not only been eluded, but in some degree repealed. Yet, in no instance, has the statute requiring wills to be in writing and proved in the manner therein prescribed, for the purpose of *passing real estate*, been evaded or disregarded by the admission of parol evidence. No case can be found where a devise of *real* estate by a will in writing has been established by the admission and effect of parol evidence; nor yet even upon the answers of the defendant. In the case of *Selwyn* v. *Brown*, in *Talbot's Cases* (see page 242 already cited), the house of lords refused to admit the respondent's answer. So it was held in *Lee* v. *Henley*, 1 *Vern.* 37, that no averment of a trust of real estate given by will can be received. See also the note of the late editor (*Raithby*) of these reports, vol. 1, page 30, note (1). It would seem from *Fane* v. *Fane*, 1 *Vern.* 30, that a trust of personal estate given by will may be averred. So of moneys arising from the sales of lands directed by the will to be sold; as appears from *Crumpton* v. *North*, cited in lady *Gainsborough's* case, 2 *Vern.* 253. The lord chancellor, *Cowper*, however, considered lady *Gainsborough's* case, and *Foster* v. *Munt* there cited, as being an innovation of the common law, in *Granville* v. *Beaufort*, 2 *Vern.* 649. All the cases cited by the counsel for the plaintiff below, to show that trusts have been established in the cases of wills by the introduction of parol evidence, relate to personal estate, or to an engagement to pay or allow money which is purely of personal character. *Thynn* v. *Thynn*, 1 *Vern.* 296, *S. C.* 1 *Eq. Ca. Abr.* 380, pl. 6; *Reech* v. *Kennegal*, 1 *Ves. Sen.* 123, *S. C. Amb.* 67; *Drakeford* v. *Wilks*, 3 *Atk.* 539; *Kingsman* v. *Kingsman*, 2 *Vern.* 559; *Devenish* v. *Baines*, *Prec. in Chan.* 3. This last case was a nomination by parol of a successor to copyhold; but it is there said that, according to the custom of the manor, an estate might be created therein by parol, without writing, and of course so might a trust, and therefore not with the statute of frauds and perjuries; and the court decreed a trust upon the promise and verbal engagement of the defendant in favour of the plaintiff. So in *Rookwood's* case, *Cro. Eliz.* 164. *Rookwood* having issue three sons, had an intent to charge his land with four pounds *per annum* to each of his two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to them duly the four pounds *per annum;* to which the younger son, being present, consented; and he promised them to pay it. For non-payment, after the death of the father, they brought an *assumpsit.* The whole court held clearly that it was well brought. Which proves that such engagements to pay money, or any thing that is personal, have no relation to the statute of frauds and perjuries. In *Heisier* v. *Clarke*, 2 *Eq. Ca. Abr.* 46, 47, held that an agreement with respect

to copyhold lands need not be reduced to writing because not embraced by the statute. So a promise by an executor to his testator to pay all the legacies in the will, provided he would not alter, is binding, 2 *Freeman* 34; also, several others are mentioned in 1 *Raithby's* edition of *Vernon*, page 31, note (2), all of the same cast, but I repeat that no case can be found of real estate passing under such arrangement and of parol testimony being admitted to establish it. Indeed there are decisions to the contrary even in the case of personal estate. In the case of *Whitton* v. *Russel*, 1 *Atk.* 448, the testator left A 20 pounds *per annum* by codicil to his will, and after talking of making another codicil and leaving him 15 pounds per annum more, the attorney told him that if B, C and D, whom he had made devisees of his estate, would give A a bond to pay him 15 pounds *per annum*, it would be sufficient. Accordingly B, *one of the devisees present, promised that he and the devisees would*, and a draft was prepared but not executed. The testator lived five weeks after this transaction, and A remained nine years without demanding the performance of the promise, or insisting to have the draft perfected, and then brought his bill. The defendant denied his promise and the plaintiff's bill was dismissed at the rolls, who thereupon appealed. A number of the cases above were cited to sustain the bill. The defendant, by his answer here, insisted on the statute of 29 *Car.* 2, for prevention of frauds and perjuries. The lord chancellor said: "*These cases upon the statute of frauds are to be proceeded upon with great caution.* The present plaintiff does not appear to be *any relation* of the testator, and I think there is no ground on the parol evidence to decree for the plaintiff in the present case, though the cases cited go a great way. The present attempt is, in effect, to add a legacy to a will and codicil in writing by parol poof, which, if relating to *personal estate* only, ought not to be allowed; but this goes further and seeks to *charge lands* with an annuity of 15 pounds *per annum, without writing*, which is *expressly against the statute of frauds;* and, in the next place, to have a specific performance of an agreement not in writing, which the court will not do."

The chancellor further adds in this case: "neither is there any ground for relief on the head of accident or *fraud:* at the time of making the will, the testator talks with only one of the devisees of giving 15 pounds *per annum* more to the plaintiff, &c.; *every breach of promise* is not to be called a *fraud*, nor does it appear that the testator was drawn in by this promise, not to add the legacy to this codicil." "Again," he adds, page 449, "demands of this kind should be pursued very recently, for the danger of perjury, intended to be prevented by the statute, increases much more after length of time, and therefore are strong objections." The lord chancellor considered the bill, in this last case, as in effect asking him to add a legacy of 15 pounds *per annum* to a will and codicil in writing upon parol proof. Was not this literally and substantially to *alter* and *change* a

part or *clause* in the written will or codicil? If so, it is *expressly* forbidden by the sixth section of our statute of wills, already in part recited, although not expressly so by the English statute of 29 *Car.* 2. So that our statute of 1705, on the subject of wills, is more restrictive than the English. If then, by the English act, the introduction of parol proof, in the opinion of such a man as Lord *Hardwicke*, be forbidden, what doubt can there be but that it is against both the spirit and letter of ours? No decision has ever been pronounced by our supreme court admitting parol testimony, for the purpose of *altering* or *changing* the effect of either a bequest of personal estate, or devise of real, contained in a written will, and making it different from the import of the words used therein, and I trust never will. We have a statute on the subject of wills, as also one against frauds and perjuries, of our own. Both somewhat different from the English. Our statute, especially in relation to wills, is materially variant, and more rigid against any alteration or change of a will in writing by parol proof. There is nothing in the British statute of frauds and perjuries, prohibiting the alteration of a written will of personal estate by making a nuncupative one, which is expressly forbidden by our statute of wills, and according to it, the change or alteration can only be made by a will in writing. There is no reason, therefore, why we should pay any regard to the English decisions, admitting parol proof, to create trusts of personal estate bequeathed by a will in writing. We have, it is true, followed the English decisions pretty closely, in the construction of our statute against frauds and perjuries. And it is now admitted, by every intelligent and dispassionate mind, that this statute has been evaded, and its true meaning, according to the ordinary and common acceptation of its language, in a great degree, disregarded. In truth, the real design and object of it has been defeated by a construction founded on a course of artificial reasoning, of which its framers never dreamed. Hence a disposition on the part of some of the best and soundest of our modern judges to narrow the door for the admission of parol evidence. In the case of *Iddings* v. *Iddings*, already quoted, in 7 *Serg. & Rawle*, page 115, the late Chief Justice *Tilghman* says, "for my own part, being convinced by experience of the danger of parol evidence, I am more inclined to shut the door, than to throw it wider open." Again, in *Bombay* v. *Boyer*, 14 *Serg. & Rawle* 256, he says, "I will add, that this liberty which courts of chancery have taken with statutes, in *contradicting* and almost *annihilating* their provisions, has introduced great uncertainty, and would not be carried so far, since our experience of its inconvenience, if our steps could be retraced, without shaking the foundations of property." Justice *Duncan*, in *Withers's* case, 14 *Serg. & Rawle*, says, "a departure from the wholesome provisions of the clear and positive enactments of that act, (meaning against frauds and perjuries) of which it has been said by English jurists, that every line of it deserved a subsidy, has been regretted; and judges, instead of extend-

ing the exceptions, are drawing in and conforming to the statute." That the true meaning and design of the act against frauds and perjuries has been perverted, no one can well doubt. As a pretence for the introduction of parol evidence, it is said that has been done to prevent fraud, and that this was the grand object of the act. It is no doubt true, that the great design of the act was to prevent fraud; but how? Surely not by the introduction of parol proof. The fraud which was dreaded and intended to be guarded against by the very words of the act, is that which arises from receiving parol evidence, which, being given under the appearance of candour and disinterestedness, imposes conviction on the minds of the judges and juries of its truth, but in reality is false. Hence, in some of the most important concerns of life, it was deemed expedient to require, that, whatever shall be done in relation to these, should be reduced to writing, and that parol evidence should not be admitted, lest, through its falsity, fraud and injustice should be done. In short, fraud committed *by means of perjury* was the *only fraud* which the act was intended to prevent; which every one must admit cannot be effectually done, but by obeying the injunction of the act, and excluding parol evidence altogether in such cases. Now, it appears obvious, that the same motives which induced the passage of the act against frauds and perjuries, with some qualifications and exceptions, caused the enactment on the subject of wills in Pennsylvania, requiring them to be reduced to writing, in order to pass lands, &c. without any exception whatever. As yet no exception has been interpolated by any exotic construction. Will the court, then, after the regret that has been felt, and so strongly expressed for the fate of the act against frauds and perjuries, consign the act on wills to a similar one? Judges are to expound, not to make the law. We, therefore, say, that the court below erred in permitting parol evidence of what the testator, *William Hoge*, said at the time of drawing his will, to the scrivener, to be given in evidence. *Richards* v. *Dutch*, 8 *Mass.* 506; *Mann* v. *Mann*, 14 *Johns.* 14.

We also contend, for the same reasons, that the conversations and declarations of *John Hoge*, the devisee in the will, ought not to have been received. For what purpose were they offered? Was it not to give an effect to the devise made in favour of *John Hoge*, altogether different from that expressed in the body of the will itself? To make *William Hoge*, the plaintiff below, the devisee, instead of *John Hoge*, who is the person not only named therein as the devisee, and the object of the testator's bounty, but so intended to be by the testator, not only as it is written in the will, but according to the parol evidence of Mr *M'Giffin* who drew the will. For he swears that, although the testator told him at the time that it was in trust, yet he named no *cestui que trust*, and declared that he could not possibly do it in any other way; and that he had full confidence in the devisee so named. *John Hoge* then, to whom the land in dispute is given by the will, was the only person in being at the time to whom the testa-

tor could think of giving it. The plaintiff was then four or five and twenty years of age, and had the testator ever thought of giving the land to him, or any interest in it, there was no plausible reason whatever why he should not have named him in his will, as the object of his regard and bounty. He was *in being and old enough* at the time to have disclosed fully what he was, or what he was like to be. Yet he is not named. Nay, there is even great reason to believe that he was not even thought of by the testator. For he was never heard to speak of him as having any regard or concern for him, much less to do any thing for him as a child, except upon one occasion that he furnished him with a horse, saddle and bridle, to get rid of the, no doubt unpleasant, importunity of *John Hoge*, the devisee, who had procured a military commission for the plaintiff, which made the above articles necessary for his equipment. It must appear unaccountably strange if the testator could have wished or designed the devise of the land in dispute for the benefit of the plaintiff; and yet the plaintiff not have it in his power to adduce a single witness who, at any time, had ever heard the testator express the slightest degree of regard for him, or say that he intended to do any thing for him. No such testimony was given, nor have I ever heard it suggested that any such existed. *John Hoge*, the devisee in the will, appeared to have done the part of a parent by the plaintiff, in schooling, educating, clothing and fitting him in every respect to make a livelihood for himself in the world. From the force of habit, if nothing else, it may be well conceived that the devisee had acquired a feeling of good will towards the plaintiff, and a desire to advance his interest in the world. Hence arose, no doubt, the impressions made on the minds of the witnesses, to which they have testified, from loose and casual conversations with *John Hoge* the devisee. But if the parol declarations of the testator be insufficient in law to make a will for devising lands, how is it possible that when he has made a written will giving his land to a person therein named, which is sufficient to pass the land to the devisee so named, and that the parol declarations of the testator cannot give or create a trust in it for the benefit of any other, that the parol declarations of the devisee can do more towards such an object than those of the testator himself? Why is it that the parol declarations of the testator cannot be received for this purpose? Because it was considered unsafe, lest, through misapprehension, perjury or any other cause, the wish and the will of the testator might be misrepresented and thwarted, in regard to the disposition of his estate: therefore it was deemed proper to require it to be put in writing, by doing of which the danger of mistake would at least be diminished. But all these reasons prove an equal necessity for having reduced to writing any thing that may be declared, and is intended by the devisee to have an effect.

It may perhaps be contended, that as *John Hoge* appears, from the face of the will after it took effect by the death of the testator, to be the owner in fee, he had a right to declare the character in which

he held the estate either as trustee or otherwise. That the statute of wills does not apply to him, but that he, upon the principle of his being owner of the land, may dispose of it by parol, by declaring that he held it in trust for the plaintiff. This, I apprehend, would not be sufficient to constitute the plaintiff a *cestui que trust*, nor yet be sufficient evidence of his being so. By the will I have already shown that *John Hoge* is not made a trustee, and if not made so by the will, there is nothing else appearing in the case by which the testator could have made or created him a trustee. The simple question then is, can a man, without any *consideration*, by parol declare himself a trustee of his land for the benefit of another? If he can, it would in effect be doing more than he could do by a deed of bargain and sale, duly executed under his hand and seal, without any consideration actually moving between him and the vendee, and without any being inserted in the deed; because in such case the vendee would be a trustee for the vendor who would be *cestui que trust*. I also consider it clear, from a fair interpretation of our act against frauds and perjuries, that a trust in lands cannot be created by parol, nor established by parol evidence, except in the case of a resulting trust, which arises rather from the operation of law upon the act of the party. As when A is furnished with money by B to buy land for B, and A purchases the land but takes the conveyance of it to himself, a trust will arise or result therefrom to the use of B who furnished the money. The consideration of the purchase in fact moved from him, and the benefit of it shall therefore return to him. But to make it a resulting trust, and take it out of the statute of frauds, it is evidently necessary that B should have advanced the purchase money, or at least some part of it, to A, at the time of the purchase. For although A agreed to buy the land for B who agreed to advance the money, yet if A buy and pay for it with his own money, he will be entitled to hold the land, and may grant it to B or not at his pleasure. See *Boyd* v. *Maclean*, 1 *Johns. Cha. Rep.* 582; *Botsford* v. *Burr*, 2 *Johns. Cha. Rep.* 409, where Chancellor *Kent* says, "the whole foundation of the trust is the payment of the money, and that must be *clearly proved* (which may be by parol). If therefore the party who sets up a resulting trust made no payment, *he cannot be permitted to show, by parol proof*, that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds; and so it was ruled by Lord Keeper *Henley* in the case of *Bartlett* v. *Pickersgill*, 4 *East* 577, note; *Hughs* v. *Moore*, 7 *Cranch* 176." See also *Steere* v. *Steere*, 5 *Johns. Cha. Rep.* 1; Justice *Duncan* to the same effect in *Peebles* v. *Reading*, 8 *Serg. & Rawle* 192; *Gregory's Lessee* v. *Setter*, 1 *Dall.* 193; *German* v. *Gabbold*, 3 *Binn.* 304, and *Wallace* v. *Duffield*, 2 *Serg. & Rawle* 421, are all cases of resulting trusts, because the purchases were considered and decided to have been made with the moneys of the plaintiffs, and therefore resulting trusts. They are no otherwise to be considered as trusts growing out of fraud, otherwise than it was fraudulent in the

defendants to withhold from the plaintiffs the lands which they had bought with their moneys; and without the plaintiff's money has been used by the defendant in the purchase there can be no resulting trust, however unfaithful he may have been to the plaintiff. Our statute of frauds contains terms, in its first section, broad and comprehensive enough to embrace equitable as well as legal estates, and I do not see how it should have been thought otherwise, if it were not for the circumstance of being copied in part only from the English statute; omitting the seventh section among others which mentions trust estates by name. At the passage of our statute, however, as well as since, legal estates and equitable or trust estates were considered as being placed on the same footing in every respect: they were liable to dower, to the lien of judgments, and to be taken in execution and sold for the payment of debts; which last is specially provided for in the English statute, though not in ours. Nor was it deemed necessary, for the reason that we had been accustomed to treat them as if they had been of legal character. It is true that the late Chief Justice *Tilghman* (in *German* v. *Gobbald*, 3 *Binn.* 304), in speaking of the first section of our law against frauds, and the particular words of it "*by act or operation of law*," says, "this provision seems to apply rather to legal estates than to trusts, &c." And so Justice *Duncan*, in *Peebles* v. *Reading*, 8 *Serg. & Rawle* 492, uses the following language:

"Though the act of the 21st of March 1772, for the prevention of frauds and perjuries, is copied from the statute of 29 *Car.* 2, yet it does not incorporate all the provisions of that statute. It, among others, omits the seventh section respecting trusts. This omission cannot be imputed to accident; and from the cases of *German* v. *Gobbald*, 3 *Binn.* 304; and *Wallace* v. *Duffield and wife*, 2 *Serg. & Rawle* 521, it would seem that the act did not prevent any declaration of trust being made by parol, &c., repeating the preceding declaration of the late chief justice. Yet Justice *Duncan*, after considering this matter more deliberately and maturely, declares, in *Withers's* case, 14 *Serg. & Rawle* 193: "although the seventh section of the statute of frauds, which enacts that all declarations or confessions of trust or confidence of any lands, &c., shall be manifested and proved by some writing, is not incorporated into our law, yet, in substance, it is comprehended in the first section of the act—'No interest in land, either in law or equity, shall pass by parol only, any consideration for making the agreement to the contrary notwithstanding, except for a term not exceeding three years; nor except by deed or note in writing signed by the party; or by the *act and operation of law*'—Trusts, arising by act and operation of law, are when *trust money* has been laid out in lands, or when one man pays the money, and the conveyance is to another. These, and cases fully within the same reason, are the only cases of resulting trusts by act and operation of law, which are within the exception of the act of assembly. *Wallace* v. *Duffield*,

2 *Serg. & Rawle* 521. To raise a trust by act and operation of law, an actual payment by *cestui que trust* must be shown to have been made at the time of the purchase. *Steen* v. *Steen*, 5 *Johns. Ch. Rep.* 1. Cases of fraud are always exceptions between the parties to the fraud." Thus we see that this learned and distinguished jurist changed his mind entirely as to the true construction of this act. If this last opinion be the true construction of the act, of which I think there can be little doubt, the parol evidence which was given of the verbal declarations of *John Hoge*, was in direct opposition to the statute. Besides, I take it to be in direct contradiction to the case of *Church* v. *Church*, 4 *Yeates* 280, where it was decided by the court unanimously, that the declarations of the grantee, made after the execution of the deed of conveyance, that she had *paid nothing for it*, but held it *in trust* for the family, were not admissible in evidence. That to receive them would militate distinctly against the act of frauds and perjuries, and that there has always been a clear and obvious distinction made between trusts of real and personal property, the latter not being considered within the English statute against frauds and perjuries. See 10 *Mod.* 404; 1 *Keble* 490.

It is alleged by the plaintiff's counsel, that it was right to admit this testimony in order to prevent fraud, and therefore it is not within the prohibition of the statute of frauds. *Lord Hardwicke*, in *Lloyd* v. *Spillet*, 2 *Atk.* 150, in speaking of resulting trusts by operation of law, and specifying two instances, says he knows of no other, "unless in cases of fraud, and when transactions have been carried on *mala fide*." This expression is also noticed by the late Chief Justice *Tilghman* in *German* v. *Gobbald*, 3 *Binn.* 305. But the kind of fraud, or the means by which it shall be effected to produce this operation of law, and take cases out of the statute against frauds, are not explained by either. I take for granted, however, that Lord *Hardwicke* does not mean such a fraud as is attached to a mere breach of contract. For, if he did, then every parol contract for the sale of land, where the vendor afterwards, without excuse, refuses to convey, would be such a fraud as to create, by operation of law, a trust in favour of the vendee, which would be directly in the teeth of the statute. There are, however, a class of cases where frauds are practised by means of false pretences, such as men of even extraordinary sagacity cannot always guard against, which might be sufficient to raise a trust. But, according to Lord *Hardwicke*, a breach of contract does not necessarily produce fraud, in such sense of the word. In *Whitton* v. *Russell*, 1 *Atk.* 449, he says, "every *breach of promise* is not to be called a *fraud*," and this was said too in application to the case before him, when the testator had left A 20 pounds *per annum*, by a codicil to his will, and after talking of making another codicil and leaving him 15 pounds *per annum* more, the attorney told him that if B, C and D, whom he had made devisees of his estate, would give A a bond to pay him 15 pounds *per annum* it would be sufficient; accordingly B, one of the devisees present, *promised that he and the devisees*

would—a draft was drawn, but not executed, and after the death of the testator was refused to be executed. The complainant prayed a specific performance, and to have the 15 pounds *per annum* charged upon the real estate. The lord chancellor *considered it an attempt in effect to add a legacy to a will and a codicil in writing by parol proof*, and dismissed the bill. How infinitely more strong was the claim of the plaintiff to relief, by the interposition of the court, in this case, than the one now presented to the court. *Whitton* was actually named in the will, and a legacy of 20 pounds *per annum* given to him. Whereas the plaintiff, in the case before the court, was *never even spoken of by the testator* as the object of his care or bounty.

Again, in the case of *Whitton* v. *Russell*, one of the devisees of the principal part of the testator's estate, that is the defendant, had actually promised to secure and pay the additional 15 pounds *per annum* to the plaintiff, when the testator talked of making a second codicil to his will for the very purpose of bequeathing this additional sum. Where then is there any evidence that *John Hoge* ever solicited the testator to make him devisee in his will of one third of his real estate, and to induce him to do so *promised* to hold it in trust? *Thomas M'Giffin*, the first witness, merely says that when he mentioned to *John Hoge* the disposition that his brother *William Hoge* had made of his estate, and told him that the testator said it was a *trust*, "*John Hoge* replied" "that is intended for young *William*," and then adds "that he had been a long time trying to get him to do it, but he had not the courage," which seem to show that he had never obtained his, the testator's consent to give any thing to young *William*. *George Morgan* is the only one who testifies to any declaration ever having been made by *John Hoge*, that could possibly be tortured into a promise by him to the testator, who says that *John Hoge* told him "one third of the real estate was left to himself in trust for young *William Hoge*;" that this had been done by his advice, or at his instance, and *as well as he can recollect*, mentioned two reasons for this; then states the reasons, which are silly enough to be sure, and such as men of the sense of *John Hoge* or the testator could never have uttered. It is evident from *Morgan's* statement, that his recollection was very imperfect and confused. He also says that *John Hoge* told him that the testator's family pride would not permit him to do—what? To give his real estate to a bastard; as he had got it from his father and wished it to be kept not only in the family name, but in that channel, which refutes at once the idea of making the plaintiff his heir, who was *nullius filius*, and could be heir, by operation of law, to nobody; and not descended from testator's father, and, of course, out of the *channel*. This is the kind of testimony relied on to prove a promise and a fraud, and to take the case out of the statute. If such testimony is to be received, in order to set the statute aside, a *George Morgan* will never be wanting as a witness for that purpose. Again, it is said that *John Hoge* has confessed the trust, and therefore it is taken out of the statute, as the

danger of perjury is removed by his confession. This is as great a mistake, or misapplication of the meaning of such a confession, as has ever been ruled sufficient to take a case out of the statute of frauds and perjuries. A confession, that must be proved by parol testimony, has never been determined sufficient for that purpose in any case. But we have the confession of *John Hoge* in writing, and given too under the solemn sanction of an oath, and after he had divested himself completely of all interest or claim in the land. *John Hoge* was certainly a man of the first respectability, on account of his intelligence and integrity. The court have his testimony on the paper book, as also the whole of the testimony that was given by both parties to the jury on the trial of the cause. They will see —unless *John Hoge* has perjured himself, which no disinterested man, that was acquainted with Mr *Hoge* in his lifetime, would dare to say—the injurious effect of admitting parol evidence in such cases. Only let a jury have the name of testimony before them when a particular feeling and excitement are got up in favour of one of the litigant parties, and no matter whether the testimony has any bearing in his favour or not, *feeling* will give him a verdict. It is also contended by the plaintiff in error that no consideration was shown, nor did any exist to raise and support a trust in favour of the plaintiff below. Inasmuch as *John Hoge* is the person, and the only one, named in the will as the devisee of the land in dispute, or for whose use and benefit it was intended, no averment can be made that it was intended for the use and benefit of any other. The rule laid down on this point is, *that every* devise implies a consideration in itself, and no averment can be made that it is for the use of any other than the devisee named in the will. *Vernon's Case*, 4 *Co.* 4 a; 1 *Cruise's Dig.* 206, sec. 447, 55; 5 *Cruise's Dig.* 9, sec. 18, 19; 2 *Woodeson* 363.

So if a man, by his will in writing, devise land to his wife, in hope that she will leave it to his son, this shall be no trust for the son. 1 *Cha. Ca.* 310; 2 *Comyn's Dig., Day's ed., tit. Chancery, Trust*, 4 w, p. 4, in the margin 800.

When an agreement is purely voluntary, not supported by a valuable or meritorious consideration, equity will not enforce the execution of it. *Newland on Cont.* 79; *Colman* v. *Sorrel*, 1 *Ves.* 50; *S. C.* 3 *Bro. Cha.* 12, 12 *Ves.* 46. It cannot be pretended that there is any valuable consideration in the case before the court. Nor is there any relationship between the testator and the plaintiff below, or between him and *John Hoge*, that will raise a good or meritorious consideration. The plaintiff below must be considered as a mere stranger to them both. A court of equity will not enforce a voluntary agreement in favour of an illegitimate child, for it is considered as a mere volunteer: although the parent is bound in morality and law to support such child, yet a court of equity, following the rule of law that a bastard is *nullius filius*, considers him in the light of a mere stranger. *Newland on Cont.* 69, 70. Thus it seems that the

law not only considers the plaintiff below as a stranger to the testator, but the testator himself even considered him so. His name was not mentioned to the writer of the will, nor to any body else that we have heard of. The land in dispute is given expressly to *John Hoge* by the testator, who at the time declared to the scrivener *that he had no other way of doing it*, repeating this declaration twice over. Whereas if he had intended any benefit to the plaintiff, he could not have said so. The declaration of the testator is, I think, very satisfactorily explained and accounted for by *John Hoge* in his deposition.

Mr *Ewing's* argument goes on the ground that *John Hoge* was a trustee. He assumes the fact in dispute, and all his authorities are predicated upon it. He says that *John Hoge* confessed the trust—if so, I should suppose *Hoge's* whole confession must be taken together, and that clearly shows that plaintiff below had no claim. The statement of *John Hoge* is clear and susceptible of a rational construction and interpretation; give it that, and the plaintiff below can have no claim. Again, he says, that the verdict of the jury assumes that *John Hoge* is perjured. *Hoge* had no agency in bringing about the compromise. It was not shown that he had interfered in any way; the question was, trust or no trust *for William Hoge?* and that was the matter compromised. The settlement, to say the least of it, was not of an acknowledged claim, but of one admitting of great doubt; a purchase of peace, on the part of the defendant below; for which he pays the land in Mercer county? Why talk of inadequacy of price, when no evidence was given on that subject, and the question was not made in the court below? This case shows the ease with which the minds of jurors are occasionally led to sacrifice *justice* to *feeling*. Can an instance be shown of a compromise fairly made, as this one was, and carried into execution, being afterwards set aside? The land was received and sold by young *William Hoge*, and the money received by him, and he lies by seven years, until the death of the principal witnesses against him, before he appeals to the popular and levelling feelings of a jury, with whom *John Hoge's* and old *William Hoge's* ideas about family names and estates would not go down. To show that a gratuitous promise will not support a bill in equity, any more than it will an action at law, I refer to 3 *P. Wms* 131, 317; 1 *Vernon* 12; 1 *Ves.* 507; 7 *Johns.* 207, 322; 10 *Johns.* 241, 594.

I consider the three first errors assigned fully noticed and established, and will come to the fourth.

What is and ought to be considered a reasonable time, within which a person, who pretends to have such a claim as the plaintiff below, ought to prosecute and assert his right to it? "It is a maxim as well of equity as of law, *leges subserviunt vigilantibus et non dormientibus*," says Justice *Duncan*, in *Peebles* v. *Reading*, 8 *Serg. & Rawle* 494. "It is on this principle, that an unexecuted location, description, or even warrant, with money paid, loses its priority after a delay in executing the contract by survey of much shorter continuance than

was in this case" [which was something less than fourteen years]. "The claimant, in opposition to the legal title, should not delay asserting his right, as a stale claim will meet with little attention." See *Sugden* 415, who says, "unless the trust arise on the face of the deed itself, the *proofs must be very clear;* and however clear they may be, it seems doubtful whether *parol evidence is admissible against the answer of the trustee denying the trust.* And in cases of this nature, the *claimant in opposition to the legal title,* should not delay asserting his right, as a *stale claim* will meet with little attention." See also *Delane* v. *Delane,* 4 *Bro. Par. Ca.* 258, where a clear case of a resulting trust was made out in favour of the complainant, who had delayed commencing his suit seventeen years, but was a minor, and abroad at the time the right descended to him from his ancestor. His bill, however, was dismissed on account of his delay to assert his right earlier.

The utmost limitation allowed for commencing a suit for such claims in Pennsylvania, I apprehend, has been seven years. As often as the legislature have turned their attention to such cases, that appears to be the time which they have allowed. Indeed, in 1705, the legislature passed an act for the purpose of securing to, and confirming to persons who had been in the possession of lands seven years under an *equitable* right, *an unquestionable title* to the same against all. Thus postponing and setting aside legal titles to lands in favour of those who had held an adverse possession of them under equitable titles. *Purdon's Dig.* 530. So in the fifth section of the act of the 26th March 1785, *Purdon's Dig.* 532, it is provided that "no person or persons that now hath or have any claim to the possession of any lands, tenements or hereditaments, or the preemption thereof from the commonwealth, founded upon any prior warrant, whereon no survey has been made, or in consequence of any prior settlement, improvement or occupation, without other title, shall hereafter enter, or bring any action for the recovery thereof, unless he, she or they, or his, her or their ancestors or predecessors have had the quiet and peaceable possession of the same *within seven years next before* such entry or bringing such action." The will of the testator, it will be observed, was proved on the 9th of November 1814. A suit was commenced in April 1820, compromised and discontinued the 29th of August in the same year. From this time, when it was believed by every body that the claim of the plaintiff below was finally settled and put to rest for ever, he lies by until the 27th of October 1827, a space of seven years and three months. Is it not for the interest of the community that claims, such as the plaintiff below pretends to have in this case, which are to be established by parol evidence, in direct opposition to every thing that has been committed to writing on the subject, as also the regular muniments of title to the land in dispute, should be prosecuted with vigilance, and not suffered to slumber until witnesses who might be all important for the party in possession under the legal title are dead? That

was really the case with respect to the defendants below in the present case. *John Hoge* and *Parker Campbell*, Esquires, both very important witnesses for the defendants, had they been living, in the mean time, had died. This circumstance, no doubt, had its weight with the plaintiff for bringing this his second suit. If the statute of wills, as well as the statute against frauds and perjuries, is to be prostrated, to make way for such claims, and the party to be indulged until he may think a suitable time has come round for asserting his claim, the owners of real estates will hold them by a very brittle tenure indeed. We claim that the court below ought, therefore, to have charged the jury, as matter of law, that the plaintiff was barred of his claim by lapse of time.

As to the fifth error assigned. I must here repeat that the paper book contains all the evidence given on the trial below by either side. The plaintiff, as it appeared from evidence, had no evidence on the trial of this case that he had not before the arbitrators in the former action, except *Jacob Henry*, who certainly did not improve his case any. Why then did the court talk of the defendant's *taking any undue advantage of the plaintiff's ignorance* in making the compromise? The court could not, I presume, have meant ignorance of *the facts*, because the defendant in the mean time had got no new testimony whatever. He was as well informed of the matters of fact at the time of compromise, as at the time of commencing, or even trial of the cause, and so the court ought to have told the jury, as they undertook to speak of ignorance; otherwise, it was calculated to mislead the jury as to the testimony of the facts. If, however, the court meant *ignorance of the law*, then there was error in this, for I take it to be well established, that *ignorance of the law*, if the party be acquainted with the facts, forms no ground for relief, even in equity. He shall be bound by his contract. Every man, says Chancellor *Kent*, is to be charged, at his peril, with a knowledge of the law. 2 *Johns. Cha. Rep.* 60; 1 *Ibid.* 516. Indeed I consider it a maxim in both civil and criminal jurisprudence: *ignorantia juris non excusat. Doug. Rep.* 471; *Bilbie* v. *Lumley et al.*, 2 *East* 469. In the *Doctor and Student*, a book of high authority, it is said, page 79, "ignorance of the deed may excuse, but ignorance of the law excuseth not." See also *Chitty on Bills* 250; *Brown* v. *Armstead*, 6 *Rand.* 601.

The case of *Millikin* v. *Brown*, 1 *Rawle* 398, involved this very principle, and the decision of the court confirms the truth of it. It is there conceded by his honour Judge *Huston*, who delivered the opinion of the court, that *Millikin*, in giving the receipt to *John Watson* for his part of a judgment which *Millikin* had against *Watson* jointly with *John* and *William Brown, Jun.*, had no intention of releasing the *Browns*, and that he never even suspected it could have any such effect; yet, inasmuch as he was bound to know the law, the court decided that he must abide by the legal consequence of his act. So in *Richter* v. *Selin*, 8 *Serg. & Rawle* 438, where the

indorser of a negotiable note to whom notice of a demand on the drawer had been given, and he *having a knowledge of the facts*, promised payment of the amount thereof, it was held that he was bound by his promise, and that *ignorance of the law* would not excuse him.

The sixth error. We say that our ninth point was not answered by the court below, or if answered at all, it was done in connexion with a reference to facts and circumstances, of which not a tittle of evidence was given to the court and jury. This point was a request to the court to charge the jury "that unless fraud had been proved to have been practised by *David Hoge* upon the plaintiff in making the compromise, it was good and binding upon him, and barred him of his action." The court below, instead of answering this point, and directing the jury in regard to it separately and distinctly, blend it with the second, third, fourth, fifth and sixth points made by the plaintiff and the eleventh of the defendant, thus rendering it difficult if not impracticable for the jury to collect any separate and precise answer from the court to the defendant's ninth point. But, what is still worse, the court, in what they give as an answer on this subject, assume facts and circumstances which were not in proof, but rather indeed expressly negatived by the evidence on the trial. These facts, and the circumstances of which we complain are "the agency or interference of *John Hoge* being employed to effect the arrangement" (compromise); "the embarrassed situation of the plaintiff to drive an unconscionable bargain, contrary to justice and fairness;" "gross inadequacy of price, connected with other circumstances of overreaching." The court have all the evidence before them that was given below by either party, and I am entirely at a loss to see in what part it is that any of these things are proved, or even testified to. Nothing of the kind appears. Was it not then the duty of the court below, upon every principle of fairness and justice, instead of addressing the jury as if they had had evidence given to them from which they might fairly infer and find all these matters and facts to be true, to have told them that nothing of the kind appeared in the evidence, and that they could and ought not to presume them to be so? For instance where is there a word of inadequacy of price in the evidence? Not a syllable. Or of *David Hoge's* employing *John Hoge* as his agent to effect a compromise, or for any other purpose; of the plaintiff's necessitous or embarrassed situation, or *circumstances of overreaching?* Does it not, on the contrary, appear, that the compromise was made and entered into by the plaintiff, with the advice of his counsel, after a full hearing of all the testimony, and of course a full knowledge of the facts and circumstances, without the least influence being used or attempted by *John Hoge*, *David Hoge*, his counsel, or the arbitrators? It does not appear that the compromise was ever sought for by *David Hoge*, his counsel, or any other on his behalf; but was entered into freely by the plaintiff below under the advice and direction of his own counsel, without even the influence of embarrassment or necessity on his part, from any thing that appears. For

we may suppose his necessity was not very pressing, when, by the terms of the arrangement, it was put into his own power to obtain a deed of conveyance from Mr *David Hoge* for the four hundred acres in Mercer county. He had first to make a selection of it, and then *David Hoge* was ready to execute the deed, yet he did not ask for it for more than a year afterwards, when, still *perfectly satisfied with the compromise*, he accepted a deed from *David Hoge* in confirmation of it, and not until after that again did he sell it. I confess it appears to me to have been cruel to leave it to the jury in the manner in which it was left, by such observations as the court made.

As to the validity of the compromise independently of fraud, no rational doubt can I apprehend be entertained. All the authorities cited on the other side as to the law and principles which obtain between trustee and *cestui que trust*, and the grounds upon which courts of equity have interfered to grant relief against the effect of contracts made between them, and of setting aside overreaching bargains made with young and extravagant heirs apparent, or persons under embarrassed circumstances, &c., may be admitted to have been correct, but surely they have no application to the present case. In all, the relation of trustee and *cestui que trust* was admitted to exist. So in the cases of purchases for inadequate prices, the rights of the sellers to the estates at the time of sale were clear of all dispute and admitted to be in the sellers, and therefore inadequacy of price with other circumstances might be evidence of fraud, as overreaching, on the part of the purchasers. But in the present case, the fact whether *John Hoge* or *David Hoge* was a trustee for the plaintiff below, and he had a right or claim to the estate as the *cestui que trust*, was the very point in issue between the parties. Was there any ground for questioning the plaintiff's right? No intelligent and disinterested person, judging from the evidence that was given to the jury, will even now say that the plaintiff has made his right to the property in dispute manifest in any point of view whatever, either *in fact or law*. It is perfectly idle then to speak of this transaction as one in which the trustee got a conveyance from the *cestui que trust* of his right. It was in truth a compromise of a real subsisting dispute and controverted right between the parties. If so, it is no objection then to the agreement of compromise that the party, supposing him to have had the better right, gave it up for comparatively a trifling consideration, had he held it free and clear of all dispute. Lord *Macclesfield* lays it down, that an agreement entered into upon a *supposition* of right, or a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement. In *Cann* v. *Cann*, 1 *P. Wms* 727, his words are: "that when two parties are contending in this court, and one releases his pretensions to the other, there can be *no colour* to set this release aside, because the man that made it had a right; for, by the same reason, there can be no such thing as compromising a suit, nor room for any accom-

modation; every release supposes the party making it to have a right; but this can be no reason for its being set aside; for then every release might be avoided." 1 *Atk.* 10; *Cavode* v. *M'Kelvey*, *Addison* 56; *Newl. on Cont.* 78; *Perkins* v. *Gray*, 3 *Serg. & Rawle* 331, 332.

We contend that the court therefore erred greatly, in the manner in which they submitted the evidence and effect of this compromise to the jury. That they ought to have told the jury, in so many words, that the agreement of compromise was most binding on the plaintiff below, and barred his recovery, unless indeed it was infected with fraud, of which there was not the slightest evidence, and they could not presume it. If such a case had been submitted to a chancellor, what would he have said? Can any one doubt?

The *seventh*, and last error which I shall notice, raises the question, whether, supposing the agreement of compromise not to be binding upon the plaintiff, and him to have made out his case, in all other points, to the satisfaction of the court and jury, he ought not, before bringing his action, to have made and tendered to *David Hoge* a deed of reconveyance for the land in Mercer county? Here, it must be observed, that the legal title to the land in dispute is in the defendants, and that the plaintiff claims to recover upon sheer equitable principles. What does equity require that he should do, before he shall demand of the defendant to surrender to him the possession of the land in dispute? Does it not require, at least, that he should restore to *David Hoge* the property which he has taken from him? Upon what principle is it that a plaintiff claims to recover the possession of land in ejectment upon principles purely equitable, in opposition to the legal title? Is it not upon the principle that, at the time of bringing his action of ejectment, he is entitled, in equity and good conscience, to be invested also with the legal title; that he has a right in equity to demand that it shall be made to him; and that if the party who has the legal title had done what in equity he ought to have done, he would have conveyed the legal title to him who has the equitable? But not having done so, equity will consider that as already done, which ought to have been done; and, upon the idea of this imputed title it is, that the party having the equitable title *in fact* only, is enabled to sustain and recover in his action of ejectment. In a court of law, if the plaintiff be entitled to recover in any form of action where damages may be recovered, he will be entitled to recover costs as a matter of course, unless it be regulated otherwise by statute. In courts of equity it is otherwise; the chancellor can exercise his discretion about giving or not giving costs. Hence it is necessary that a party who comes into a court of common law to enforce an equitable claim, must do equity, and every thing that equity requires of him to be done, before he shall commence his suit, so that, consistently with the principles of equity, he may be entitled to recover the costs also of his suit. This matter is very clearly and satisfactorily explained by his honour the present

chief justice, who delivered the opinion of the court in the case of *Snyder* v. *Wolfley*, 8 *Serg. & Rawle* 332, who says, "when the plaintiff has a title to recover at law, and the defendant has an equitable claim which ought to be first satisfied, it has been held that a tender at the time of trial is sufficient; or perhaps the jury might find a conditional verdict; but when the action is in place of a bill in chancery, and the plaintiff's title is incomplete in equity, the rule is different." Now it seems to be admitted by the plaintiff's counsel, that his title to the land is incomplete, in equity, until he shall reconvey the Mercer county land, or at least make compensation for it. And even if he did not admit it, could any body doubt of it? And in that case it was decided, that an action could not be maintained to recover the prize drawn to a lottery ticket which has been lost, without, previously to the commencement of the suit, giving or tendering an indemnity against future claims founded upon it, inasmuch as by its terms the prize was made payable to the bearer. So in the case of *Chahoon et al.* v. *Hollenback*, 16 *Serg. & Rawle* 433, it was held, that "when the plaintiff relies on an equitable title, the tender must precede the action." Besides, take the common case of a man who is cheated in the purchase of a horse or other article, for which the purchaser has paid to the seller 100 dollars as the price, by the suppression of the truth or suggestion of a falsehood on the sale. He wishes to have a return of his money again; and to bring for that purpose an action for money had and received. This action, no doubt, may be maintained on the ground that the contract is void for the fraud; but, if the buyer of the horse wishes to avoid the contract, and thereby get his money again, what must he do before he brings his action? Surely, he must offer at least to return the horse. *Norton* v. *Young*, 3 *Greenleaf's Rep.* 30; *Kimball* v. *Cunningham*, 4 *Mass.* 502; *Conner* v. *Henderson*, 15 *Mass.* 319; *Young* v. *Adams*, 6 *Mass.* 182; *M'Nevin* v. *Livingston*, 17 *Johns.* 437; *Hunt* v. *Silk*, 5 *East* 452; *Lawrence* v. *Dale*, 3 *Johns. Cha. Rep.* 42.

It does appear that the court below were manifestly wrong, in their charge to the jury on this head; and I, therefore, submit the case without further argument.

N. Ewing, for defendant in error.

The only material question in this cause is, whether the court below erred in admitting parol evidence to establish a trust in *John Hoge?* The other exceptions are either not supported in fact, or have nothing in them. The question then is, does the statute of frauds of Pennsylvania prohibit a parol declaration of trust? Unless a distinction can be taken between estates created by deed, and those created by will, the point appears to me as well settled as any other in Pennsylvania. It is said by Chief Justice *Gibson* in the case of *A. Hampton, Guardian*, 17 *Serg. & Rawle* 148, "that *to prove a trust, is one of those cases in which parol evidence is admissible,*" and Chief Justice *Tilghman*, in the *Lessee of German* v. *Gobbald*, 3 *Binn.* 304, says that

the provision of our statute "*seems to apply rather to legal estates than trusts*," and notices that the English legislature so considered it, as *they added a provision with respect to trusts in the seventh and eighth sections of their statute which is entirely omitted in our act of assembly.* If this be so, the question is at an end, and the cases of *Thompson* v. *White*, 1 *Dall.* 424; and *Wallace* v. *Duffield*, 2 *Serg. & Rawle* 521, appear to establish this position. In the latter case Justice *Gibson* declares expressly, that it is *not a resulting trust*; and Chief Justice *Tilghman*, in page 526, says, *a trust might not result by operation of law*, but considers the investment of the testator's money strengthened by *the declarations* of the executors, sufficient to prove an express trust, and in page 527, he approved of the charge of the court below to the jury, that the law would *not raise a trust*, unless an *intention* to create it was *proved by parol* or other declarations; and Justice *Yeates*, in page 528, says, "the question of fact was submitted to the jury whether an *express* trust was not proved," and approves of the above cited part of the charge of the court below. The case of *Thompson* v. *White*, to which I shall have occasion again to call the particular attention of the court, appears to be recognized and approved by Justice *Huston* in the case of *Thompson* v. *M'Canahan*, 17 *Serg. & Rawle* 112 and 113; after stating the facts of the case, he says, "proof was admitted that these conveyances, though on the face of them absolute, were, in fact, in trust; *what that trust was*, and *for whom*, was *made out by parol.*" In the case of *Peebles* v. *Reading*, 8 *Serg. & Rawle* 484, the broad and naked question is presented and decided, that our statute *does not prevent a declaration of trust by parol.* Justice *Duncan*, who delivers the opinion of the court, says, in page 492, "this is not a resulting trust;" and this is one of the strongest possible cases: a purchaser at sheriff's sale, who paid his own money, and took possession of the property purchased, was by *parol proof* alone made a trustee for the *defendant* in the execution. In this case Justice *Duncan* also notices the important variance in our act from the English statute, in omitting the seventh section of the latter respecting trusts, and he adds, *this omission cannot be imputed to accident.* But were it necessary, it would be no difficult task to show that in the case before the court parol evidence is admissible, even under the English statute, and I would here call the attention of the court to some part of the evidence, which assimilates this case to the case of *Thompson* v. *White*, as well as takes it out of the operation of the English statute. By the testimony of *George Morgan*, it appears that *John Hoge* confessed that the property in dispute was left to him in trust for the plaintiff; *that this was done by his advice, or at his instance;* and by the testimony of Mr *M'Giffin.* It appears that when the testator spoke of the difficulty of making provision for the plaintiff, *John Hoge* suggested to his brother *to give it to him.* In the case of *Reech* v. *Kennegal*, 1 *Ves. Sen.* 123, at page 125 the lord chancellor says, "the court has adhered to this principle, that the statute *should never be understood to*

protect fraud, and therefore wherever a case *is infected with fraud*, the court will not suffer the statute to protect it *so as that any one should run away with a benefit not intended.*" See same case (*Reech* v. *Kennigate*), *Ambler* 67. In page 68, it is said, the statute was not designed to protect frauds; and in *Hutchins* v. *Lee*, 1 *Atk.* 447, where an absolute assignment was decreed a trust, upon *parol evidence*, it is said that *parol evidence is admissible in evidence of fraud*; and Chief Justice *M'Kean*, in 1 *Dall.* 427, says, "the statute and act of assembly were made to prevent *frauds* as well as perjuries; they should be construed liberally, and beneficially expounded, for the suppression of cheats and wrongs." In page 428, he says, "here was a breach of trust in *Lawrence Salter*, a *fraud in law*, which is not within the act. This *is the reason of our judgment.*" In cases of fraud, and where transactions have been carried on *mala fide*, there is a resulting trust by operation of *law; Lloyd* v. *Spillet*, 2 *Atk.* 150. *Per Duncan*, Justice, in *Peebles* v. *Reading*, 8 *Serg. & Rawle* 492; and *per Tilghman*, in *Lessee of German* v. *Gobbald*, 3 *Binn.* 305. Now trusts resulting by operation of law are expressly excepted out of the English statute by the eighth section. In *Thompson* v. *White*, the only fraud of which *Lawrence Salter* was guilty, was his neglecting to perform the promise or undertaking which induced his wife to vest the title to the property in dispute in him. This breach of trust is considered a fraud in law, a fraud on the person creating the trust or reposing the confidence. This is the principle upon which many of the cases there cited, turn. The cases of *Thynn* v. *Thynn*, 1 *Vern.* 296; *Eq. Ca. Abr.* 380, pl. 6; *Reech* v. *Kennegal*, 1 *Ves. Sen.* 123, *Abr.* 67; and *Drakeford* v. *Wilks et al.*, to which the particular attention of the court is called, are all cases of wills; as are also the cases of *Kingsman* v. *Kingsman*, 2 *Vern.* 559, and *Devenish* v. *Baines*, *Prec. Cha.* 3: so that it cannot be said the cases of wills can be distinguished from those of deeds; and in many of the foregoing cases the facts are precisely similar to those of the present case. The defendants obtained the interests which they attempted to hold, at their own solicitation, and by promising to hold as trustees for others. *Here John Hoge solicits and prevails on his brother to give him the property, by promising to be a trustee for the plaintiff.* Shall he then be permitted to shelter himself under the statute? Shall the statute be construed to protect and sanction such monstrous fraud and iniquity? Where it is agreed that the terms of a contract shall be reduced to writing, which is prevented by the fraud of one party, the contract will be established; and why? Because a statute made to protect against frauds shall not be made the instrument of fraud.

To prove that the provisions in wills are liable to be affected by parol evidence as well as those of deeds, I refer the court to the late case of *Baily* v. *Herkes*, 1 *Penns. Rep.* 126.

The second error assigned, I consider disposed of with the first.

After establishing the doctrine contended for in considering the first exception, the only question remaining in the third exception is,

whether a trust may be declared to a bastard. Upon this question I presume there can be no difficulty; for though bastards are not considered as children for whom a consideration of blood will raise an use, when the *possession remains* in the party creating the use or trust; yet where the *estate is actually passed to a third person*, where there is a transmutation of possession, a use may be as well declared to a bastard, *being in esse* and sufficiently described, as to any other person. See *Hargrave's Note* 8, *to Co. Litt.* 123, a.; *Fonbl. Eq.* 124, n. (*Am. Ed.* 1820).

To the fourth exception we reply, that twenty years, by analogy to the statute of limitations, is the period allowed by chancery for commencing proceedings to set aside conveyances of real estate on the ground of fraud. See *Wallace* v. *Duffield*, 2 *Serg. & Rawle* 521; *Morse* v. *Royal*, 12 *Ves.* 374, 377; 4 *Desaus.* 706. In the fifth exception there is nothing; the answer of the court is sufficiently explicit; and particularly when taken in connexion with the other parts of the charge, is by no means vague and ambiguous, and I contend that it is too favourable to the defendant. The court will observe that *David Hoge* takes as a volunteer from *John Hoge*, and of course as a trustee, as *John Hoge* was. *Macreth* v. *Symmons*, 15 *Ves. Jun.* 329, 336, 350; 1 *Scho. & Lefr.* 262; *Talb.* 261; 2 *P. Wms* 681. It will also be observed that the conveyance of *John Hoge* to *David* was made *five days before* the release of the plaintiff to *David*. *During that period then*, he stands precisely as *John Hoge* stood. Now it may well be questioned, whether a court of chancery would, under any circumstances, sanction the purchase of the trustee from the *cestui que trust*: and most certainly it would not, when, at the moment of the purchase, the trustee was denying and controverting the title of his *cestui que trust*. See *Church* v. *Marine Ins. Co.*, 1 *Mason* 341; *Clement* v. *Peters*, *Coxe's Dig. U. S. Rep.* 726, pl. 38; *Munroe* v. *Allaire*, 2 *Caines's Cas. in Er.* 183. A release by *cestui que trust* to trustee cannot vest any beneficial interest in the trustee. *Per Tilghman* and *Yeates*, in *Newlin* v. *Newlin*, 1 *Serg. & Rawle* 279, 280; and per *Bradford*, Judge, in *Bixler and wife* v. *Kunkle's Executors*, 17 *Serg. & Rawle* 304; and by *Todd*, Judge, in the same case, 308, 310. And although some of the cases do not make a purchase by the trustee from the *cestui que trust*, *absolutely* void if *fairly* and *openly* made; yet even these cases say that it is looked upon with the greatest jealousy, and that there must not be the least tincture of fraud or inadequacy; and before a trustee can deal with his *cestui que trust*, the relation must in some way be dissolved; or if not, the parties must be put so much at arm's length that they agree to take the character of purchaser and vendor, and all the duties of those characters must be performed. *Davis* v. *Laing*, 2 *Johns. Cha. Rep.* 259, 257, 260; 6 *Ves.* 277; 2 *Bro.* 427, note.

In examining this case the court will bear in mind, that it is established by the verdict of the jury, that *John Hoge*, the original trustee, was perjured in the testimony he gave in the cause. Here

then is a trustee, after suit brought against him for the trust property, *conveying to his brother*, and presenting himself as a witness, and *by perjury* denying the trust, and thus inducing the *cestui que trust* to convey to the trustee. *The jury have further established David Hoge's privity to all this.* But for argument sake, suppose him innocent; can he hold the property thus iniquitously acquired? Interests obtained through the fraud of another person cannot be maintained by third persons, although not themselves parties to the imposition. *Huguenin* v. *Baseley*, 14 *Ves. Jun.* 288; *Bridgeman* v. *Green*, 2 *Ves. Sen.* 627, *S. C. Wilm.* 64. See *Inhabitants of Worcester* v. *Eaton*, 13 *Mass.* 376. The person receiving property "*must take it tainted and infected with the undue influence and imposition of the person procuring the gift.*" "*Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow.*" *Per Wilmot*, in *Bridgeman* v. *Green*, *Wilm.* 64, cited with approbation by Lord *Eldon*, in *Huguenin* v. *Baseley*, 14 *Ves. Jun.* 289. Fraud vitiates an agreement, and a *principal, though innocent of the fraud*, cannot avail himself of such fraudulent agreement made by his agent. *Owens* v. *Whitaker, Hughes's* (*Kent.*) *Rep.* 71; *Taylour* v. *Rochford*, 2 *Ves. Sen.* 281. Now, in the case before the court, it must be taken as established, that *John Hoge* acted as the agent of *David Hoge*, and that the release was procured through his instrumentality, by his imposition and false representations. The court will recollect that here is a property valued by *John Hoge*, the trustee, at 15,000 dollars, released by the *cestui que trust to his trustee* for 940 dollars, or property of that value. Ought not the court below to have instructed the jury that this *gross inadequacy*, connected with the *situation, circumstances*, and *relation* of the parties, was such *strong, overwhelming* and *conclusive* evidence of fraud, imposition and oppression, as to invalidate the whole transaction. In the case of *Butler* v. *Haskell*, 4 *Desaussure* 651; where one fourth was paid: the chancellor, at page 687, says, "the courts have said, that the inadequacy may be so gross as to furnish strong and *even conclusive* presumption of fraud, and that *in this way, the grossness of the inadequacy may avoid the sale;*" and he proceeds, "in comparing the inadequacy existing in the case under consideration with the degrees of inadequacy existing in the decided cases, it seems to come completely within that degree of gross inadequacy which furnished the presumption, and *vitiated the contracts.*" In our case the inadequacy is nearly four times greater than that which Chancellor *Desaussure* held to come within the decided cases and to vitiate a sale. Instead of receiving one-fourth of the value of the property sold, the plaintiff received but *a fraction over a sixteenth.* In the case of *Baugh* v. *Price*, 1 *Wils.* 320, the inadequacy did did not amount to one half. To this and the other cases cited in the above mentioned case of *Butler* v. *Haskell*, I particularly refer the court, not only as establishing the principle now under consideration, but to prove that the compromise of the original suit

does not place the defendant on better ground than he originally occupied. In the case of *Butler* v. *Haskell*, at p. 697, the chancellor concludes thus: "I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong and in general a *conclusive presumption* (though there be no direct proof of fraud) that an undue advantage has been taken of the ignorance, the weakness, or the distress or necessity of the vendor."

In the case of *Bowes* v. *Heaps*, 3 *Ves. & B.* 119, where it was not imputed to the defendants that they *used any endeavours* to induce the plaintiff to enter into the transaction, *but merely acceded* to the proposal that was made them; the master of the rolls declared, that it was not every bargain which distress may induce one man to offer, that another is at liberty to accept. The *mere absence* of fraud does not necessarily decide the validity of the transaction, as is proved by many cases, from *Berney* v. *Pitt*, 2 *Cha. Rep.* 396, 2 *Vern.* 14, down to *Gwynne* v. *Heaton*, 1 *Bro. Cha. Rep.* 1. In the latter case, Lord *Thurlow* says, the defendant is not charged with misleading the plaintiff's judgment, or tampering with his poverty. In that case too, as in this, the *bargain had been hawked about* and *offered to many persons*. That, Lord *Thurlow* says, *only shows the distress of the borrower*. In the case of *Chesterfield* v. *Janssen*, 2 *Ves. Sen.* 125, 1 *Atk.* 301, where the defendant loaned 5000 pounds, to be repaid 10,000 pounds, *only* on the contingency of the borrower surviving his grandmother. The borrower, *John Spencer*, was about thirty years of age, impaired in constitution; his grandmother seventy-eight, of good constitution, and careful of her health. He sent the proposal to market. *It was rejected by several knowing ones, and at first by the defendant*, but afterwards accepted by him. The grandmother lived six years and three months, and *Spencer* survived her one year and eight months. At the time of this transaction, *John Spencer* possessed *an income of* 7000 pounds *per annum*, and a *personal estate of great value*. Had the case stood on its original ground, as here stated, the court would have set aside the transaction. It was sustained only on the ground of the deliberate confirmation by *John Spencer*, and the renewal of his bond after the death of his grandmother. In the above cited case of *Gwynne* v. *Heaton*, 1 *Bro. Cha. Rep.* 1, the grant of a reversionary rent-charge, after the death of plaintiff's father, who was old and infirm, upon unreasonable terms, was set aside; though it was contended for the defendant, that he was not a dealer in such transactions, and was *invited into the bargain, and the terms deliberately settled by the plaintiff and his friends;* the same terms having been offered to other persons; also that *Gwynne* was not an expensive young man dependent on his father; that there was a contingency too, by which defendant might have lost all his advances, and that the disproportion was not enormous; for if the father had lived seven years, there could not have

been any pretence of such inequality as the court would relieve against. So that it was reduced to the single question, whether this agreement was upon such an inadequate consideration that *this court will set it aside on that ground alone*, there *being no pretence of imposition.* But *all these reasons were urged in vain*, as it appeared that the consideration was grossly inadequate, being, as was stated, *three or four for one.* The lord chancellor said, *the ground for relief was gross inequality*—that the *charges of fraud and oppression were not proved*—that the vendor made the offer to the purchaser, who *accepted it in the very shape it was offered*, and did not labour to lower the terms. *There was no confidence* subsisting between the seller and the buyer; *there was no misleading of the judgment* of the vendor, nor tampering with his poverty. The chancellor there reviews the decided cases, and shows that inadequacy alone cannot, as *mere inadequacy*, be made a ground for setting aside a contract, yet it was, when very gross, a *mask of fraud*, and, *in that way, would operate to vitiate the bargain.* In *Butler* v. *Haskell*, 4 *Desaussure* 687, 688, the chancellor says, "there is a distinction made between the case of young heirs selling expectancies, and of others, which I am not disposed to support. It is said that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in chancery have gradually applied the great principles of equity, on which relief is granted to *every case where the dexterity of intelligent men* had obtained bargains at *enormous and unconscientious disproportion*, from the ignorance, the weakness or the necessity of others, whether *young heirs or not.*"

In the case before the court, the pendency of the former suit and the discontinuance of it, at the time and in consequence of the compromise, cannot take it out of the general rule. It is all *one transaction*, done all at the *same time.* There is no *subsequent, distinct* and *independent* act of confirmation. The release and discontinuance of the suit were one transaction; and nothing is done subsequently but in pursuance of the original stipulation. But had the release been *first* given, and the suit *afterwards* instituted to annul it, and then discontinued, from any consideration whatever, except a fair and adequate price, we are not without authority to show that the plaintiff would still be at liberty to assert his original rights. See 4 *Desauss.* 715. In the case of *Taylour* v. *Rochford*, 2 *Ves. Sen.* 281, the plaintiff, a seaman, sold his prize money to a physician, at the place where the prize was brought in, and where plaintiff was sick. A bill was filed in chancery to set aside the agreement. A *second agreement* recited the first bill of sale for 150 pounds, and *the bill in chancery* which plaintiff *agreed should be dismissed* with costs, and in consideration of 60 pounds plaintiff *confirms and establishes* the bill of sale, and *renounces all claim* on account of the prize or other demands, and *all suits in law or equity—both agreements were set aside.*

In *Broderick* v. *Broderick*, 1 *P. Wms* 239, there was a devise to *J.*

S. by a will defectively executed (the witnesses not having signed in the presence of the testator). Afterwards the heir, in consideration of 100 guineas, *released to J. S. all his right;* and after that *J. S.*, under pretence that it would facilitate the raising of money to pay debts, procured the heir, for 50 *guineas more*, to *join him in conveyance to J. N.* by lease and release, for 4000 pounds, for which a receipt was given, but money not paid—*J. N.* being merely a trustee for *J. S. The heir was relieved against both deeds.* In *Ardglass* v. *Muschamp*, 1 *Vern.* 237, after the grant of the rent charge, the grantor made a settlement of his estate repugnant to the grant, and *brought his bill to be relieved* against the grant, alleging that it was obtained by fraud. *After which bill the defendant obtained a release* from the plaintiff, the grantor. The grantor died, and then the present plaintiff brought his bill, and was *relieved against both the grant and release.*

In *Wiseman* v. *Broke*, 2 *Vern.* 121, the plaintiff, a man of business and experience, near forty years old, entered into statutes with defendant's testator for payment of ten for one. Afterwards defendant's testator, understanding that chancery relieved against such bargains, preferred his bill against plaintiff, to compel him either to repay the money, with interest, or to be foreclosed of any relief against this bargain, and *plaintiff elected to stand to the bargain*, and said that it was *fairly and duly* made, and that he *would not seek any relief against the same. Notwithstanding all this plaintiff was relieved.*

So in *Butler* v. *Haskell*, there had been repeated confirmations, after an interval of years. See 4 *Desaus.* 714, 715.

In *Baugh* v. *Price*, 1 *Wilson* 320, *Thomas Baugh* on the 21*st of October* 1739, *covenanted* to convey to defendant in fee simple a remainder expectant upon his father's life. Soon after signing the articles, he was desirous of being *off* the bargain, but defendant would not let him; and on the 3*d of November* 1739 he *executed a lease and release.* On the 8th of July 1740 his father died, *whereupon he wrote to Price*, acquainting him with the fact, and telling him *that he shall act in all respects* agreeably to his wishes; *in another letter* he tells *Price* he shall always act justly, and says that *Price* has got a good bargain of him; that he might afford to give him a *back;* but, says he shall not touch one without *Price's* consent. After this, in February 1741, *Thomas Baugh filed his bill in chancery to set aside the articles and conveyance.* To this, the defendant put in his answer, and afterwards *the proceedings were stopped*, and *Thomas Baugh, in October* 1741, *executed a deed reciting the proceedings in chancery, and that the purchase was a fair one*, and thereby *confirms* and *releases* the estate to *Price. Afterwards Thomas Baugh* and *Price*, with the assistance of one Doctor *Thomas*, (to whom *Thomas Baugh* applied) *settled all accounts*, and *Thomas Baugh* seemed so well satisfied, that he thanked Doctor *Thomas* for his kindness. In 1743, *Thomas Baugh's* bill in chancery was dismissed, and in 1746, he died. The plaintiff, his son, soon after preferred this bill, and the *articles* and *both deeds were set aside;* and the barons say, in page 323, that "there was no

instance where the original contract was fraudulent, that *any subsequent act would purge it*, and that *by stopping the suit in chancery*, and the *release thereupon given*, the *fraud was double hatched*, and that the transaction *was iniquitous from beginning to end.*" And, I think, the same observations may most justly be made in the case before the court. I shall conclude this point by a quotation from *Hovenden's Supplement to Ves. Jun.* vol. 2, page 164, 165. "The court of equity have very wisely avoided *laying down any general rule* as to the cases in which they will relieve against unfair bargains, lest other means of avoiding the remedies given by the court should be found out. *Lawley* v. *Hooper*, 3 *Atk.* 279. It is proper that the court of chancery *should leave itself unrestricted* on this point, as far as possible, and be *guided by the particular circumstances in each case. Stillman* v. *Ashdown*, 2 *Atk.* 481. For the possibility will always exist, that *human ingenuity* in contriving fraud, will go beyond any cases which have before occurred. *Webb* v. *Rock*, 2 *Scho. & Lefr.* 666."

The sixth exception is not supported in fact, for the court does explicitly answer it in the last clause of the third paragraph from the end of the charge, and also in its answer to the sixth point of defendant; but if the court had altogether omitted to answer it, the defendant could not have been injured thereby, as the law had before been laid down more favourably than defendant had a right to claim.

The charge of the court on the seventh point was at least as favourable to defendant as he was entitled to have it. This is an equitable proceeding, and relief is granted on such terms as in each particular case may appear just. By a recurrence to the cases already cited, it will appear that the impossibility of placing the defendant precisely in his original condition is no objection to the interference of the court, and that the most that is required is that compensation be made. It often happens that valuable improvements are made; but these present no obstacle to the rescinding of the contract, and in such cases, the court merely directs payment for *valuable* and *permanent* improvements, and not for such as are intended to please the taste or fancy.

Before closing, I beg leave to call the attention of the court to one circumstance, which I omitted to notice in examining the first exception. It is this, that here the *trust* is actually confessed by *John Hoge*, the trustee; and the only question is, *who* is the *cestui que trust?* Although the defendant may plead the statute, yet, if instead of doing so, he confesses the facts charged in the bill, the court will interfere, notwithstanding the statute.

It is known to every man who ever tried a good cause, that the parties often take many things as true without proof. Some facts are so notorious that no one thinks of denying them. They are mentioned by one party, and not contradicted by the other; and parties and court and jury proceed upon the assumption of the truth. Such was the case here; the standing circumstances and relations of

the parties were all known, stated, and not contradicted. So also the relative value of the land in controversy, and the land in Mercer received by plaintiff below. The gross inadequacy is noticed by the court below in its charge.

I make these remarks, in reply to the observations of the counsel of the plaintiff in error, that all the evidence appears on the paper books. I might admit, that all which was said by the witnesses, who were examined, is embraced in the paper books, which I think is not the fact, yet a great deal which was known and assumed by both parties and court, is not there found.

In reply to the cases cited by the plaintiff in error, to show that parol evidence cannot be admitted, I would observe, that they merely prove that you cannot *add* or *contradict* what is written ; such are all his cases. The case of *Lee* v. *Henley*, 1 *Vern.* 37, in which he says, it was held " that no averment of a trust of real estate given by will can be received," contains no such principle. It was an attempt by *Lee* to have inserted in a conveyance to him, a tract or parcel of land which, the scrivener said, was omitted by mistake. It was not a will, but a voluntary conveyance, without consideration, to a nephew.

We do not ask the court to impugn in the slightest degree the will of *William Hoge*. We establish it, and claim under it, but show a matter extrinsic perfectly consistent with it. We do nothing more than this court has lately decided, may be done with a solemn decree of a court of record. In the case of *Berrington* v. *Clark*, decided at the last term, it was held that parol evidence might be received, to show that lands which were decreed by the orphan's court to the eldest son at the valuation, were held by him under that decree, *in trust for all the heirs*. The cases in New York are not applicable here; as that part of the English statute relative to the declaration of trust, which has been omitted in ours, has been adopted in New York. What is said by Justice *Duncan* in *Withers's case*, 14 *Serg. & Rawle* 193, must be taken in reference to the case under consideration. It was not a question between a trustee and a *cestui que trust ;* but an attempt by one brother to claim another brother's share of the proceeds of the real estate of the father, sold under a decree of the orphan's court, in opposition to a judgment creditor of the brother. There was not even an obligation of a sale, but merely a parol agreement, that he should be reimbursed moneys advanced when the land should be sold. The question was, whether that promise should be preferred to a judgment. The case of *Church* v. *Church*, 4 *Yeates* 280, was the case of a voluntary deed which, of course, was good against all but creditors. The evidence therefore sought to be given, that defendant had acknowledged he had given nothing, was irrelevant. It was a contest between two volunteers.

The counsel for the plaintiff in error says " that no disinterested man who was acquainted with *John Hoge* in his life time, would dare to say he was perjured." Now, the whole case turned upon that fact, and was expressly put upon it by the plaintiff below. It

was explicitly admitted, that unless the jury believed that *John Hoge* was perjured, the plaintiff could not recover. The jury have therefore said, that he was perjured, and they were disinterested men.

It is also alleged, that although *John Hoge* has confessed a trust, yet his whole confession must be taken together. It is true, we must take it all together, but we are not bound to believe all, a part may be true and all the rest false.

The allegation that the defendants below lost important witnesses by death, is altogether unfounded. They still have all the benefit of *John Hoge's* testimony, and Mr *Campbell* knew nothing, but the compromise ; and it is known that witnesses who could have put the whole matter to rest by establishing the trust, and who were intimately acquainted with the entire arrangements and views of the testator and *John Hoge*, were dead before *John Hoge* ever dared to equivocate upon the subject.

The plaintiff in error has insisted upon many things which are matters of consideration for a jury, but with which a court of error has no concern, and which, therefore, I shall not notice, but proceed to the last exception. It must be remembered, that the plaintiff below seeks to recover on the ground of fraud by the defendant, and I might use the words of his honour, the present chief justice, in *Riddle* v. *Murphey*, 7 *Serg. & Rawle* 236 : "he (the defendant) could not claim to be reimbursed in the character of a purchaser, for if the sale was fraudulent, it was a nullity." There the defendant held the legal title, yet a previous tender was held unnecessary. This must be the rule in every case where the defendant is affected with such fraud as will make him a trustee. The case before the court is not like the case refered to in *Snyder* v. *Wolfley*, 8 *Serg. & Rawle* 332, where plaintiff's title is *incomplete* in equity, in which case only the rule is said to require a previous tender. It more nearly resembles the case of *Moody's Lessee* v. *Vandyke*, 4 *Binn.* (31) 43. The defendant's equity, if he has any, can only appear on the trial. It may be that he has received more in the rents and profits than he is entitled to claim ; and even in the case of a mortgage, if the rents and profits received by the lender, *up to the time of trial*, are equal to the money lent and interest, the borrower may recover in ejectment, without bringing the amount into court. *Wharf* v. *Howell*, 5 *Binn.* 499. The court is referred to all the cases before cited, where courts have interfered for fraud. In none of them is a previous tender required.

In this case, more than justice is rendered to the defendant by the provision made in the verdict of the jury. He is doubly paid : first by the rents and profits, and then by the verdict of the jury. It is not every fraud that is so well rewarded.

The opinion of the Court was delivered by

Gibson, C. J.—The sum of the evidence on the part of the plaintiff, in relation to the first of the two essential points in the cause,

is contained in the testimony of Mr *M'Giffin*, and the deposition of Mr *Morgan*. The first of these testified, that when he was writing the will, the testator remarked, that "as regards the devise to his brother *John Hoge*, it was a trust, and that he had no other way of doing it: he must leave it entirely to his honour." That no words were used to designate the person for whom the trust was intended; but that *John Hoge*, the devisee, subsequently told the witness, "that it was intended for young *William Hoge*;" and that he had "suggested" to the testator to give the estate to him (*John*) as a means of obviating difficulties in securing the benefit of it to young *William;* that he had been a long time trying to get him to do it, but that he had not had sufficient courage. Mr *Morgan* deposed to an admission of *John Hoge*, that the devise to him had been in trust for young *William;* "that this had been done by his (*John's*) advice, or at his instance; and that he had wanted his brother to do more for him." Beside these, Mr *Swearingen* testified to admissions of "an understanding between him and his brother, that if young *William* should marry and have a male heir, it would be in his power to do something decent for him." The first question is, whether this evidence were competent to go to the jury, and, if not disproved, to found a trust for *William*, the plaintiff, who was the testator's natural son.

Contemporary declarations of a testator have always been, not only competent, but powerful evidence of the fact declared; and the competency of declarations by the devisee, while he was the owner of the land, will not be disputed. Indeed, the objection was rather to the fact itself, than the evidence of it; and it is contended that parol evidence of a trust is contrary to our statute of wills, which corresponds, as far as regards the point in dispute, with the British statute of frauds. Undoubtedly, every part of a will must be in writing; and a naked parol declaration of trust, in respect of land devised, is void. The trust insisted on here, however, owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee, to get at him; and there is nothing in reason or authority to forbid the raising of such a trust, from the surreptitious procurement of a devise. In *Dixon* v. *Olmius*, 1 *Cox's Cha. Ca.* 414, a devisee who had been guilty of several acts of fraud and violence, particularly in preventing an attorney, sent for by the testator to alter his will, from entering the bed room, was promptly declared a trustee for the party intended to have been benefited by the alteration. The question has been, as to the circumstances which constitute such a fraud as will be made the foundation of a decree. A mere refusal to perform the trust is, undoubtedly, not enough; else the statute which requires a will of land to be in writing, would be altogether inoperative: and it seems to be requisite that there should appear to have been an agency, active or passive, on the part of the

devisee in procuring the devise. In *Whitton* v. *Russell*, 1 *Atk.* 488, it was thought, by high authority, that even a promise to the testator to perform the trust, was not such an agency, because, as it was said, the fraud, if any, consisted not in the procurement of the will, but in the subsequent refusal to perform it; and that every breach of promise is not a fraud. But it was also thought that the testator had not, in fact, been drawn in to make the will by the promise; and on no other ground is the decision to be reconciled to a train of authorities by which it is conclusively established, that if he has executed his will on the faith of such a promise, the devisee shall be compelled to make it good. In *Harris* v. *Horwell*, *Gilb. Eq. Rep.* 11, a testator who had devised all his land to his nephew, desired his heir at law not to disturb him in the possession of certain after purchased lands; and it was so decreed. So in *Chamberlaine* v. *Chamberlaine*, 2 *Freem.* 34, a testator having settled lands on his son for life, and having discourse about altering his will, for fear there should not be enough beside to pay certain legacies to his daughters, was told by the son that he would pay them, if the assets were deficient; but afterwards, pretending that the lands devised to him fell short of these legacies, filed his bill to have a sum alleged to be equal to the deficiency, raised out of other parts of the estate; and it was decreed that, having suffered his father to die in peace on a promise which had prevented him from altering his will, he should pay them himself, the chancellor further remarking, that it was the constant practice of the court to make decrees on such promises. That was a strong case, as the relief claimed would probably have put the son in no better condition than if the alteration had been made. To the same effect is *Devenish* v. *Baines*, *Prec. in Cha.* 3, in which a copyholder, intending to devise the greater part of his copyhold to his godson, and advising with the copyholders how that might best be done, was prevailed upon by his wife to nominate her to the whole, on her promising to give the godson the part intended for him; and it was decreed against the wife, notwithstanding the statute of frauds. And in *Oldham* v. *Litchfield*, 2 *Vern.* 506, lands were charged with an annuity, on proof that the testator was prevented from charging them in his will, by a promise of payment by the devisee. There are many other decisions to the same point; but I shall cite no more than *Thynn* v. *Thynn*, 1 *Vern.* 296, in which a son induced his mother, by promising to be a trustee to her use, to prevail on her husband to make a new will, and appoint him executor in her stead; and he was so decreed. I have cited these authorities with a particular reference to their circumstances, to show that the difference taken in the argument between real and personal estate, is without foundation. The principle of the relief to be granted, is very satisfactorily disclosed by Lord *Hardwicke*, in *Reech* v. *Kennegal*, 1 *Ves.* 122, where an executor and residuary legatee, who had promised to pay a legacy not in the will, was decreed to discharge it out of the assets; and I shall close my remarks on this

part of the case with a recapitulation of his introductory observations. The rule of law and of the court, said the chancellor, strengthened by the statute is, that all the legacies must be written in the will; and that all the arguments against breaking in on wills by parol proof were well founded. But notwithstanding that, the court had adhered to the principle that whenever a case is infected with fraud, the court will not suffer the statute to protect it so that any one shall run away with a benefit not intended. That the question was, whether the allegation of fraud were strengthened by the promise of the defendant; and he was of opinion that it was. That it had been taken that the fraud must be on him who might have remedy by law; but the court considered it as a fraud also on the testator. To apply this to the case at bar. If the testator was induced by the promise of his brother, much more if by his suggestion, to believe that a devise to him was the most prudent plan of securing the estate to his illegitimate son, it cannot be said that a breach of confidence thus reposed in him, was intended to be protected by the statute; and with a direction to this effect, the point was put to the jury.

If, then, equity would have decreed the trust against the devisee, it remains to be seen whether the plaintiff has precluded himself from insisting on it against the defendant. The plaintiff had brought his ejectment against a tenant of the devisee, to which the latter had declined to become a party, and while the cause was before arbitrators, had executed a conveyance, the nature of which will presently be stated, to the present defendant, *David Hoge*, and his son *William*, by which he became a witness and testified, it is to be presumed, to the facts contained in his deposition here. This advantage would not have been accorded to him on a bill in equity, for which our ejectment is a substitute, as he would have been made a party. As it was, however, the cause was compromised under the pressure of his testimony, the plaintiff conveying his equity to the defendant, and the latter executing a bond with condition to convey to the former certain lands to be selected by him from a larger body. These were subsequently selected, and a part of them sold by the plaintiff.

By the conveyance of *John*, the devisee, an estate in *tail male* was limited to *William*, the defendant's son, with power to his father, whom I treat as the party really interested, to take the profits during his life, and to "sell and dispose of" the estate, if he should deem it necessary, for the education and advancement in life of his male children. This was a power in gross, or perhaps simply collateral, but being a general one, it gave the *fee simple* to the father, just as if it had been conveyed to him by a deed of bargain and sale, instead, as this was, of a covenant to stand seised; consequently the legal estate being in the defendant, the parties stood, at the time of the compromise, in the relation of *cestuy que trust* and trustee.

The compromise of a doubtful title when procured without such

deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights; and this part of the case depended, therefore, on the plaintiff's ability to bring home to the defendant a knowledge of the falsehood and malpractice imputed to the devisee. The direction presupposed the existence of such practice; and the point was to fix the degree of connivance necessary to make the defendant participant of it. The jury were instructed that if the release were "obtained through the misrepresentation of *John Hoge*, and in consequence of the influence of his testimony and the persuasion of the arbitrators, it is not binding, if *David Hoge* KNEW of such misrepresentations and availed himself *unduly* of such influence and misrepresentations." Who can doubt it? The least advantage taken with a knowledge that it flowed from a corrupt source, would be undue and fatal to the contract. Again: "Should you find that the release was procured by the fraud, falsehood, imposition or influence of *John Hoge*, it is void, *however innocent David Hoge may be*, if the agency or interference of *John Hoge* was *employed* to affect the arrangement. But if *David Hoge* KNEW *of no such misrepresentation*, nor had unfair advantage from such influence and persuasions; if he was not PRIVY to any fraud, falsehood or imposition, even supposing *John Hoge* had perjured himself in the testimony which he gave before the arbitrators, and *David Hoge* had no knowledge or reason to believe it was so, the agreement of compromise will not be avoided." It must be admitted that in attempting to attain to greater precision by repeating the same proposition in different words, the judge has expressed himself not without a shade of obscurity; for it is not easy to determine, without a view of the context, what was meant by innocence which could employ the fraud, falsehood and imposition of another. But in putting the converse of the proposition, it was clearly explained, that by innocence was meant that comparative degree of culpability which consists in abstaining from an interference in the criminal act, but without rejecting a benefit procured by it; for the jury were plainly instructed that if the defendant had neither knowledge of the deceit nor reason to suspect the devisee of playing a foul game for his benefit, the compromise which was the consequence of it would be a binding one. Could he ask for more? Standing as a volunteer, and perhaps the instrument of a corrupt purpose, he ought to appear clearly to have been an unconscious one. He was bound not merely to a scrupulous observance of good faith, but even to vigilance in detecting whatever might give him an unfair advantage. A participation in the benefits of the fraud, having knowledge of its existence, or leaving the means of knowledge unimproved, would undoubtedly implicate him as a confederate, and whether as an active or a passive one, would be immaterial to the question. In this view the point was submitted, and in language which could not on the whole have been misunderstood by the jury.

The remaining points seem to have been immaterial. In regard to this species of trust, the illegitimacy of the beneficiary can never be a circumstance of moment, since equity would undoubtedly declare any one a trustee who would interpose between a testator and his bounty to a stranger. Neither could the alleged delay in prosecuting, affect the right: certainly it could not, as regards the perpetrator of the fraud or one standing in his place. Beside, it does not appear there was any considerable lapse of time between the discovery of the deception alleged to have been practised in the compromise, and the institution of the suit. Finally, the direction prayed in the defendant's ninth point, was actually given in the very part of the charge to which I have particularly adverted; and in no part of the cause do we perceive any thing which requires it to be sent to another jury.

KENNEDY, J, took no part in the judgment, having been of counsel with the plaintiff in error.

Judgment affirmed.

Methodist Church *against* Remington et al.

A trust in favour of an unincorporated religious society is an available one, if the society be constituted entirely of members resident within the state.

The statutes of *mortmain* have been extended to this state only so far as they prohibit dedications of property to superstitious uses, and grants to corporations without a statutory license.

The act of 1730, entitled "an act for the enabling of religious societies of protestants within this province to purchase lands for burying grounds, churches," &c., being an affirmative statute, cannot be construed to prohibit a trust which derives its support from the common law.

It is the equitable powers of a court which can compel the execution of a trust which has not the benefit of any principle of legislative recognition, but those equitable powers will not be exercised to enforce a trust which is against the policy of the state, as expressed by the legislature in its acts in parallel cases.

The deed in this case to individuals "for the use of the members of the Methodist Episcopal Church in the United States of America," &c., *held* not to create an available trust.

APPEAL from the circuit court of *Alleghany* county.

This was an action of ejectment in the name of *The Methodist Church of the city of Pittsburgh*, against *Stephen Remington*, *Charles Avery*, *Thomas Robinson*, *Charles Craig*, *Patrick Leonard*, *John Phillips*, *Edward Moore*, *Andrew Applegate*, *John Bissell*, *Robert White* and *George Brown*, for parts of lots Nos. 469 and 470, in the city of Pittsburgh, and also for an acre of land in the Northern Liberties of Pittsburgh. The cause originated in the late divisions in the Methodist Episcopal church, and was tried before Mr Justice *Rogers*, who in order to bring the questions of law involved in it directly before the court in bank, directed a general verdict for the plaintiff.

[Methodist Church v. Remington.]

The property was claimed by the Methodist Episcopal church, which sued in the name of the corporation, as a trustee to its use.

The original title was not the subject of dispute; and the plaintiff gave in evidence the following deed, the efficacy of which gave rise to the questions of law which were argued and determined.

This indenture, made the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and twenty-four, between *George Miltenberger*, of Pitt township, in the county of Alleghany, and commonwealth of Pennsylvania, and *Rebecca* his wife, of the one part, and *Charles Avery*, *Thomas Cooper*, *Nathaniel Holmes*, *John Phillips*, *Charles Craig*, *Samuel K. Page* and *James Varner*, trustees of the Methodist Episcopal church of Pittsburgh, the other part: Whereas, *John Woods* and *Theodosia* his wife, by their deed, bearing date the third day of June, in the year of our Lord one thousand eight hundred and thirteen, did grant and convey unto the said *George Miltenberger*, and to his heirs and assigns, four certain contiguous lots or pieces of ground, situate in the city of Pittsburgh, in the commonwealth of Pennsylvania, marked and numbered in the general plan of Pittsburgh, Nos. 467, 468, 469 and 470, bounded by Smithfield street, by Seventh street, by Cherry alley and by Strawberry alley, as by the said recited deed, recorded in the office for recording of deeds in and for the county of Alleghany, in book T, page 62, reference being thereunto had, will more fully and at large appear. And whereas, the said *George Miltenberger* and *Rebecca* his wife, by indenture bearing date the thirtieth day of May, in the year of our Lord one thousand eight hundred and seventeen, granted and devised unto *John Wrenshall*, *Robert M'Elhenny*, the said *John Phillips*, *Robert M'Elhenny, Jun.*, *Edward Hazleton*, the said *Nathaniel Holmes* and *Thomas Cooper*, (then trustees of the said Methodist Episcopal church of Pittsburgh) three certain contiguous lots or pieces of ground, situate in the city of Pittsburgh aforesaid, marked in the plan of lots, laid out by said *George Miltenberger*, Nos. 1, 2 and 3, (being part of the said lots marked and numbered in the general plan of Pittsburgh, Nos. 469 and 470) bounded and described as follows, to wit: beginning at the corner of Smithfield street and Seventh street, and running by Smithfield street southwardly sixty feet, thence to lot No. 4, eastwardly a parallel line with Seventh street one hundred and ten feet to *Miltenberger's* alley, thence by the said alley northwardly a parallel line with Smithfield street sixty feet to Seventh street, and thence by Seventh street westwardly one hundred and ten feet to the place of beginning; together with the free use and privilege of the said alley called "Miltenberger's alley," to hold the said described three contiguous lots or pieces of ground, with appurtenances, to the said *John Wrenshall*, *Robert M'Elhenny*, *Edward Hazleton*, *John Phillips*, *Robert M'Elhenny, Jun.*, *Nathaniel Holmes* and *Thomas Cooper*, and to their successors in office, in trust, that they erect and build, or cause to be erected and built thereon, a house or place of worship for the use of the members of the Methodist Episco-

pal Church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church, at their general conferences in the United States of America; and in further trust and confidence, that they should at all times for ever hereafter permit such ministers and preachers, belonging to the said church, as shall from time to time be duly authorised by the general conference of the ministers and preachers of the said Methodist church, or by the yearly conferences authorised by the said general conference, to preach and expound God's holy word therein, and in further trust and confidence, that as often as one of the trustees herein before mentioned shall die or cease to be a member or members of the said church, aceording to the rules and discipline aforesaid, then and in such case, it shall be the duty of the stationed minister or preacher, (authorised as aforesaid) who shall have the pastoral charge of the members of the said church, to call a meeting of the remaining trustees as soon as conveniently may be, and when so met, the said minister or preacher shall proceed to nominate one or more persons to fill the place or places of him or them, whose office or offices has or have been vacated as aforesaid, provided the person or persons so nominated shall have been one year a member or members of the said church immediately preceding such nomination and of at least twenty-one years of age; and the said trustees, so assembled, shall proceed to elect, and by a majority of votes appoint the person or persons so nominated to fill such vacancy or vacancies, in order to keep the number of seven trustees for ever: and in case of an equal number of votes for and against the said nomination, the stationed minister or preacher shall have the casting vote; subject to the payment of a ground rent of 300 dollars *per annum* for ever, payable by the said *John Wrenshall*, *Robert M'Elhenny*, *Edward Hazleton*, *John Phillips*, *Robert M'Elhenny*, *Jun.*, *Nathaniel Holmes* and *Thomas Cooper*, and their successors, to the said *George Miltenberger*, his heirs and assigns, as by the said recited indenture, recorded in the office aforesaid, in book X, pages 283, 284, 285 and 286, reference thereunto being had, will more fully and at large appear. And whereas, the said *Charles Avery*, *Thomas Cooper*, *Nathaniel Holmes*, *John Phillips*, *Charles Craig*, *Samuel K. Page* and *James Varner*, are desirous of extinguishing the said ground rent, and of holding the said described premises in trust as aforesaid, released and discharged therefrom: and whereas, the said trustees have paid and discharged the said ground rent arising upon the said demised premises in full to the day of the date of these presents. Now this indenture witnesseth, that the said *George Miltenberger* and *Rebecca* his wife, for and in consideration of the sum of 3000 dollars, lawful money of the United States, to them in hand paid by the said *Charles Avery*, *Thomas Cooper*, *Nathaniel Holmes*, *John Phillips*, *Charles Craig*, *Samuel K. Page* and *James Varner*, at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, have

granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm, unto them the said *Charles Avery, Thomas Cooper, Nathaniel Holmes, John Phillips, Charles Craig, Samuel K. Page* and *James Varner*, and their successors (trustees in trust for the uses and purposes herein before mentioned and declared), as well the said ground rent of 300 dollars *per annum* for ever hereafter, as the said three contiguous lots or pieces of ground, situate in the city of Pittsburgh aforesaid, and marked and numbered in the said plan of lots laid out by the said *George Miltenberger*, Nos. 1, 2, and 3, bounded by Smithfield street, by lot No. 4, Miltenberger's alley, and by Seventh street, containing together in breadth from Seventh street to lot No. 4, sixty feet, and in length or depth from Smithfield street to Miltenberger's alley, one hundred and ten feet as aforesaid, together with all and singular the buildings and improvements, rights, liberties, privileges and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof. Also, all the estate, right, title, interest, property, claim and demand whatsoever, of them the said *George Miltenberger* and *Rebecca* his *wife*, in law or equity or otherwise howsoever, as well of, in and to the said contiguous lots or pieces of ground, Nos. 1, 2 and 3, as in and to the said ground rent of 300 dollars *per annum*. To have and to hold the said described three contiguous lots or pieces of ground, Nos. 1, 2 and 3 as aforesaid, hereditaments and premises hereby granted or mentioned, or intended so to be, with the appurtenances, unto the said *Charles Avery, Thomas Cooper, Nathaniel Holmes, John Phillips, Charles Craig, Samuel K. Page* and *James Varner*, and their successors in office for ever, released and discharged of and from the said ground rent, of 300 dollars *per annum*, and every part thereof, in trust for the uses and purposes herein before mentioned and declared. Provided, nevertheless, that if the said trustees, or any of them, or their successors, have advanced or shall advance any sum or sums of money, or are or shall be responsible for any sum or sums of money, on account of the said premises, and they, the said trustees or their successors, be obliged to pay the said sum or sums of money, they or a majority of them shall be authorised to raise the said sum or sums of money by a mortgage on the said premises, or by selling the said premises after notice given to the pastor or preacher who has the oversight of the congregation attending divine service on the said premises, if the money due be not paid to the said trustees or their successors within one year after such notice given. And if such sale take place, the said trustees or their successors, after paying the debt and other expenses which are due from the money arising from such sale, shall deposit the remainder of the money produced by the said sale in the hands of the steward or stewards of the society belonging to, or attending divine service on said premises, which surplus of the produce of such sale, so deposited in the hands of the said steward or

stewards, shall be at the disposal of the next annual conference authorised as aforesaid, which said annual conference shall dispose of the said money according to the best of their judgment for the use of the said society. And the said *George Miltenberger*, for himself and his heirs, doth covenant, promise and agree to and with the said *Charles Avery*, *Thomas Cooper*, *Nathaniel Holmes*, *John Phillips*, *Charles Craig*, *Samuel K. Page* and *James Varner*, and their successors chosen and appointed as aforesaid, against him the said *George Miltenberger* and his heirs, and against all and every other person or persons lawfully claiming or to claim the same or any part or parcel thereof, or any rent or arrears of rent, shall and will warrant and for ever defend by these presents. In witness whereof, the said *George Miltenberger*, and *Rebecca* his wife, have hereunto set their hands and seals the day and year first above written.

GEORGE MILTENBERGER, [L. S.]
REBECCA MILTENBERGER, [L. S.]

Sealed and delivered in the presence of *M. B. Lowrie.*

Recorded Sept. 28th, 1824, book F 2, page 287, &c.

The plaintiff also gave in evidence the act of assembly of the 5th March 1828, incorporating this church and others. (*Pamph. Laws*, 143.) Trustees, *Patrick Leonard*, *Edward Moore*, *Thomas Robinson*, *James Taber*, *Adam Baker*, *Stephen Remington*, *Andrew Applegate* and *John Bayard.* The verdict having been rendered for the plaintiff, a motion was made by the defendants for a new trial, and the following reasons assigned:

The court erred, in charging the jury that plaintiff was entitled to recover—

1. Inasmuch as the plaintiff and defendants both claim to be the Methodist Church of the city of Pittsburgh; the defendants claiming to hold the property in dispute as trustees of said corporation, duly elected by a majority of the members, and were never legally removed from their said office of trustees.

2. Because the proceedings on the alleged trial of those trustees by Mr *Lambdin* and the committee appointed by him, did not and could not affect or impair their right as trustees under the act of incorporation.

3. That defendants, at the commencement of this suit, were trustees of said corporation, both in law and fact, and in possession of the church, and that in either case the plaintiff cannot recover.

4. That the right of defendants to the possession of the property cannot be inquired into in this form of action; the fact of their being trustees entitles them to the possession, and their right to be so must be tried in another way.

5. That the legal title to this property is not vested in the plaintiff.

6. That the trusts created in the deed from *Miltenberger* and wife, and *O'Hara* and wife, to the grantees therein named, for the use of the members of the Methodist Episcopal Church of the United States, and in behalf of such preachers of said church as shall be sent from time to time as in said deeds mentioned, are void. The Methodist

Episcopal Church in the United States is not incorporated under our laws, and can neither take nor hold directly or indirectly any real estate. A grant for the use of said church generally, or of the conference or preachers thereof, cannot be carried into effect.

7. Membership in the Methodist Episcopal church is not a requisite qualification for membership in the corporation called the Methodist Church of the city of Pittsburgh.

The motion was overruled, and the defendants appealed.

The cause was argued in this court by

W. W. Fetterman and *Forward*, for appellants.
Burke and *Wilkins*, for appellees.

The opinion of the Court was delivered by

Gibson, C. J.—Before the spirit of discord and separation, which seems at present to possess the elements of all things, had manifested itself in the Methodist society, there was but one congregation of that denomination in Pittsburgh. In process of time the building, in which its exercises were performed, was found to be too small for its accommodation; in consequence of which the principal subject of this action was purchased, and a church built on it by the Methodist brethren and individuals belonging to other denominations. The grant was in the form prescribed in the book of "doctrines and discipline" of the society: that is to say, the conveyance was to natural persons, but without words of inheritance, and in trust to erect a house of worship "for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time may be agreed upon and adopted by the ministers and preachers of the said church at their general conference in the United States of America; and in further trust and confidence, that they shall at all times hereafter permit such ministers and preachers belonging to the said church as shall from time to time be duly authorized by the general conference of the ministers and preachers of the said Methodist church, or by the yearly conferences authorized by the said general conference, to preach and expound God's holy word therein." To this was added, a grant to the trustees of perpetual succession, with power to appoint their successors from persons to be nominated by the minister in charge. To a professional mind it is unnecessary to intimate that this formula was adopted in ignorance of the common law, which suffers not the fee to pass by deed without technical words of inheritance, or an individual to clothe an association of natural persons in one of the principal attributes of a corporation. What effect the want of proper words of conveyance may have on the ultimate destination of the property, it is not at present for us to say. The cause has been argued as if the fee had actually passed, and our business is consequently with the validity of the trust. But it will not be thought an officious interference with the concerns of the society to

suggest to it, or the parties ultimately entitled, the necessity of immediate measures to secure the property, held by it under this form of assurance, to the objects originally contemplated by the donors.

The decision in *Witman* v. *Lex*, 17 *Serg. & Rawle* 388, is full to the point, that a trust in favour of an unincorporated religious or charitable society, is an available one; and were the *Methodist Society* constituted entirely of members resident within the state, would probably rule the cause. This society, however, pervades the United States, and, till lately, was connected, it is believed, with the same sect in the British provinces in America. It then becomes necessary to inquire, how far a trust in favour of what is, in some respects, a foreign society, is consistent with the spirit of our laws. The act of 1730, entitled "an act for the enabling of religious societies of protestants, *within this province*, to purchase lands for burying grounds, churches, &c." provides that, "it shall be lawful for any religious society of protestants *within this province*, to purchase, take, and receive by gift, grant or otherwise, for burying grounds, erecting churches, houses of religious worship, schools and almshouses, for any estate whatever; and to hold the same for the uses aforesaid of the lord of the fee, by the accustomed rents." The words "religious societies within this province" are understood to mean congregations, or distinct communities, though, perhaps, members of a superior body, and not particular sects or denominations, that cannot be said to have a local habitation any where: so that, if the trust before us is not to be sustained but on the enabling provisions of this statute, it must fail. On the other hand, it is fair to say that, though it derives no support from the statute, it is not necessarily prohibited by it; for it is an undoubted rule of construction that an affirmative statute such as this is, does not take away the common law, and there certainly was no absolute prohibition of such a trust by the common law, or any previous statute. The statutes of *mortmain* have been extended to this state only so far as they prohibit dedications of property to superstitious uses, and grants to corporations without a statutory license. The present is certainly not a superstitious use; and, indeed, it is not easy to see how there can be such a thing here, at least in the acceptation of the word by the British courts, who seem to have extended it to all uses which are not subordinate to the interests and will of the established church. So far was this carried in the *Attorney-General* v. *Guise*, 2 *Vern.* 266, that the charge of an annual sum for the education of Scotchmen to propagate the doctrines of the church of England in Scotland, was treated as superstitious, because presbyteries were settled there by act of parliament. The trust before us, then, not being within the purview of any of the statutes of *mortmain*, as extended to this state, and the common law carrying the objects of the conveyance no further into effect than to vest the title in the trustees, how far are we to lend the equitable powers of the court to the execution of a trust which has not the benefit of any principle of legislative re-

cognition? Equitable powers, in support of charitable uses, seem to be founded rather in necessity and the constitution of the court, than in the provisions of the 43 *Eliz.*, which is not in force here; and granting that in the exercise of them we are to have respect to the usages and necessities of our own people, it must be admitted, on the other hand, that we are to be guided by the policy of the legislature, as proclaimed by its acts in parallel cases. Admitting, then, that this trust requires not the aid of the act of 1730 to remove any positive impediment to it, yet as the execution of it requires an exertion of the equitable powers of the court, it must likewise be admitted that this exertion can be had only in subordination to the avowed policy of the state, which is too clearly expressed in that statute to be misconceived. Nor is it expressed in that statute alone. The power of self-incorporation delegated on certain conditions, by the act of 1791, to associations for literary, charitable and religious purposes, is expressly restrained to "citizens of this commonwealth;" and the value of the annual profits of real estate to be held even by such corporations, is limited to 500 pounds. The statutes of *mortmain*, too, which deprive corporations of capacity to hold, would be of little avail if foreign unincorporated societies might possess all the incidents of ownership by the instrumentality of a trust. It is fair to infer, then, from all these statutes, an intent to interdict to such societies the use of privileges that were but sparingly allowed to our own citizens. Though no sect has shown a disposition to acquire real estate as an engine of power, or even for purposes of revenue beyond the exigences of its current expenditure, the legislature has entertained an evident jealousy of clerical monopoly, by limiting the right of tenure to just so much ground as may be adequate to the purposes of sepulture and the erection of buildings dedicated to religious or charitable uses. In the act of 1730, it is further provided, that "nothing in this act contained shall be taken or construed to enable any of the said religious societies, or any person or persons whatsoever in trust for them or to their use, to purchase, take or receive any lands or tenements, by gift, grant or otherwise, for or towards the *maintenance or support* of the said churches, houses of worship, schools or almshouses, or the people belonging to the same, or for any other use or purpose, save for the uses in this act before mentioned." Now, though glebes have been held in trust as appurtenant to the churches of unincorporated congregations whose property in the soil has been the subject of judicial recognition, as in *Caufman* v. *The Congregation of Cedar Spring*, 6 *Binn.* 59, yet the trust depended not on the enabling provisions of the statute, but on the custom of the province as stated in *Witman* v. *Lex;* and certainly it does not follow, that the members of a religious society, a vast majority of whom are strangers to the custom, should be let into the benefit of it without a legislative license. It seems to me, however,—I speak for myself—that a statute to authorize such trusts would commend itself not less to the judgment of the lawgiver than to the feelings of the philanthropist. Notwithstand-

ing the disregard of popular rights apparent in the constitution of the Methodist Episcopal Church; the sacrifices of its ministers to the promotion of piety, by a life of poverty and self-denial, and their uncommon success in restoring to society the lost and the worthless, whose case is ordinarily reached by the ministration of no other clergy, ought, it seems to me, to allay the fear of clerical dominion, and render it worthy of consideration, whether their efforts in the cause of virtue and good government do not deserve to be encouraged by any reasonable concession of the civil authority.

The preceding remarks dispose of the question of the title so far as the Methodist Society is concerned; and as the conclusion at which we have arrived is adverse to a right in it to recover in any shape, the decision might be rested here. There are, however, other matters in the cause which seem to call for consideration. The legal estate, at least for the lives of the original grantees, is vested in the corporation by force of their conveyance to it; but in whom is the beneficial interest? The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the state for the purpose of being appropriated *in eodem genere*, as no court here possesses the specific powers necessary to give effect to the principle of *cy pres*, even were the principle itself not too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment. The declared trust then being simply a nullity, we have the ordinary case of a purchase in the name of third persons, and consequently a trust resulting by implication of law in favour of those who paid the purchase money. Whether their interests were surrendered to the corporation, by becoming parties to the charter subsequently procured, it is unnecessary to say. If such of the contributors as adhere to the communion of the Methodist Episcopal Church, should still be deemed to have an interest in the property in proportion to the part of its price paid by them, it is obvious, that to enforce it by the law, would produce an endless train of petty legislation, vexatious to all parties, and certainly not very profitable to the cause of religion. But they undoubtedly are entitled to compensation in point of conscience; and not only justice, but every consideration of policy points to a compromise by which they may receive what will no doubt be promptly tendered, a fair remuneration.

The title to the burying ground, which, though included in the action, has not been insisted on, depends on circumstances and principles essentially different. The ground was purchased by individuals belonging to the congregation as a cemetery for the families of themselves, and others who should be found willing to pay for compartments in it; and the title was vested in trustees, but without the semblance of a trust for the Methodist Society, which therefore has no colour of right to it. It is observable, however, as a circumstance to be regretted, that the plan of vesting the title was, as in the case of the church, a conveyance to trustees without words of inheritance,

and an attempted substitution of the principle of succession for the common law principle of descent.

In conclusion, it is but necessary to remark, that even were the Methodist Society beneficially entitled, it could not recover in an action at law, its remedy being a petition to have the trustee for the time being removed for a misapplication of the property to uses foreign to the purposes of the trust; and least of all, could it recover in the name of the corporation by an action against the corporation's officers, who are *ex officio* entitled to the management, and consequently to the possession of its property. In every aspect, then, the cause is with the defendants; and I have only to add the expression of a desire that this unhappy controversy may presently cease, at least within the precincts of this state, where the title is so plainly settled by municipal regulations, as to leave nothing to the usual chances of litigation. What the event may be in other states, it would be presumptuous in me to predict; but it certainly would conduce no less to the temporal than to the spiritual comfort of the parties, were they to part in peace having settled their respective claims to the property on the basis of mutual and liberal concession.

Kennedy, Justice, took no part, having been of counsel in the cause.

New trial awarded.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

LANCASTER, NOVEMBER ADJOURNED TERM 1832.

Nutz *against* Reutter.

A wife cannot be joined with her husband as a defendant in an action founded upon a contract or promise express or implied, unless she made the contract or promise, or did the act, from which it was to be implied, before coverture, when she must be joined with her husband.

In an action *ex contractu* against several, it must appear by the pleadings that the contract was joint, and that fact must be proved; but with regard to the promise of a husband and wife, it must in law be considered and treated as the promise of the husband alone.

An action against a husband and wife, upon a contract of the wife *dum sola*, abates as to the husband at his death.

The appointment of a guardian, and an act done by him in pursuance of such appointment, is such evidence of general guardianship as will defeat an action *ex contractu* by the ward against the guardian, until his account is first settled by the orphan's court.

ERROR to the common pleas of *Dauphin* county.

The suit was commenced by *Eliza C. Reutter*, the defendant in error in that court, to October term 1821, against *George K. Nutz* and *Mary* his wife, late *Mary Reutter*, administratrix of *Michael Reutter*, deceased, to recover a distributary share of the personal estate of the deceased, which she claimed as one of his children under the intestate laws of this state. Pending this suit, *Mary* the wife of *Nutz* and administratrix of *Michael Reutter*, on the 27th of July 1832, died. On the 21st of July 1824, a declaration in *assumpsit* was filed

in the cause, setting forth that the plaintiff below, who is the defendant in error here, upon the death of her father *Michael Reutter*, became entitled to a distributive share of the goods and chattels of the said *Michael*, which remained after the payment of his debts, and which amounted to 45,000 dollars. That the said *Mary Reutter* was duly appointed administratrix of the said goods, and that as such they all came into her hands. That the intestate at the time of his death left a widow, to wit the said *Mary*, and three children, the plaintiff below, one other daughter named *Charlotte*, and a son named *Daniel*, all of whom were still living; and that the plaintiff was entitled to one-third of the said goods, equal in value to 10,000 dollars, after deducting from the whole amount one equal third part as the widow's portion. That the said *Mary*, in consideration of the premises, after the death of the said *Michael*, and before her intermarriage with the said *George K. Nutz*, (which is therein also averred) "on the 6th day of October 1807, at the county aforesaid, upon herself did assume, and to the said *Eliza* then and there did promise, that she said *Mary*, the said 10,000 dollars, to the said *Eliza*, when thereto afterwards she should be required, well and faithfully would pay and content;" and then concluding in the usual form with a breach of this promise, and laying the damages at 12,000 dollars. On the same day that this declaration was filed, the cause was referred under the compulsory arbitration law to referees, who, on the 4th of September following, reported against *George K. Nutz*, one of the defendants below, 4857 dollars and 42 cents. From this award the defendant, on the 18th of the same month, entered his appeal; and on the 30th day of October following, died. On the 1st of March 1826, the court below granted leave to the plaintiff's attorney to file a new declaration; and on the 28th of May 1827, at the request of the plaintiff's attorney, a rule was granted by the court below on *Daniel N. L. Reutter*, the plaintiff in error here, to plead on six weeks notice, or judgment. On the 5th of July following, Mr *Elder*, as attorney for the plaintiff in error, appeared in the court below, and after reserving all exceptions to the irregularity of the course taken against his client, as per paper filed, put in the plea of *non assumpsit*.

The new declaration filed by leave of the court, after reiterating the first to the word "nevertheless," at the commencement of the conclusion, proceeds in the following words: "and whereas, the said *George* after his espousal with the said *Mary*, to wit on the 1st day of May 1808, at the county aforesaid, in consideration of the promise and assumption of the said *Mary*, and of the goods and chattels aforesaid having come into his hands and possession, and appropriated to his own use, upon himself did assume, and to the said *Eliza* then and there did promise, that he, the said *George*, the said 10,000 dollars, to the said *Eliza*, when thereto afterwards he should be required, well and truly would pay and content. Nevertheless, the said *Mary* while she was sole, after the death of the said *Michael*, and before her intermarriage with the said *George*, and the said

George since his espousal with the said *Mary*, although often required, *their aforesaid promise and assumption* nothing regarding, the said 10,000 dollars or any part thereof to the said *Eliza* have not paid, but the same to pay to her, the said *Mary*, before her intermarriage with the said *George*, and the said *George* since his espousals with the said *Mary*, have they each of them altogether refused, and still do refuse, to the damage of the said *Eliza*, 5000 dollars."

At the trial the plaintiff in error added the plea of the statute of limitations; a plea, also, that *George K. Nutz*, his testator, was, on the 4th of May 1813, duly appointed by the orphan's court of Dauphin county, guardian of the person and estate of the defendant in error, who was a minor, under the age of fourteen years at that time, and that all the money and goods mentioned in the declaration as having come to his hands, if any such ever did come, came into his hands and possession as guardian of the person and estate of the said *Eliza*; and that no account of his guardianship has ever been stated and settled in the said orphan's court. And again, as a plea against the further maintenance of this action, alleged, that since the commencement and during the pendency of it, the said *Mary Reutter*, administratrix as aforesaid of the said *Michael Reutter*, on the 27th day of July 1822, at the county aforesaid, died. The replication to the plea of guardianship denied the appointment of *Nutz* as guardian; or that if he was so appointed, it was only until the defendant in error should attain the age of fourteen years; and, in the last place, that the appointment was procured by fraud.

The replication to the plea of the death of the administratrix, *Mary Reutter*, pending the suit, admitted her death, as alleged, but claimed to maintain the suit notwithstanding, because *Nutz* had obtained possession of all the goods immediately after his intermarriage with the said *Mary*, and had retained them until after her death in his hands, as was therein alleged, in trust and for the use of the said *Eliza*.

Upon the trial of the cause, the plaintiff in error gave in evidence, among other things, a certificate from the clerk of the orphan's court of Dauphin county, showing that, on the 4th of May 1813, *George K. Nutz*, his testator, had been appointed, upon the application of himself and wife, guardian of the person and estate of the defendant in error; and it was admitted that, as such, he had attended to and prosecuted an action of ejectment for the recovery of a tract of land, part of the estate of the defendant in error, lying in Northumberland county; but alleged, that his appointment of guardian was designed for the special purpose of prosecuting that suit, and that he never accepted or took upon himself the guardianship of the defendant here for any other purpose.

After the evidence was gone through with on both sides, the court below charged the jury, that this action might be sustained against the executor of *George K. Nutz;* and that the death of his wife, pend-

ing the suit, did not abate and put an end to it; although it was commenced against him and her jointly.

In respect to the appointment of *George K. Nutz* as guardian, the court below further charged the jury in the following words. "By the record of the orphan's court it appears that *George K. Nutz* was appointed guardian of the plaintiff. But it is denied that he took upon himself the guardianship of plaintiff beyond *bringing suit in that character to recover* a tract of land for plaintiff and her brother and sister, in Northumberland county, for which purpose alone it is said he was appointed guardian. I leave to the jury to decide, whether *Nutz* took upon himself the guardianship of plaintiff's estate. The mere appointment of *George K. Nutz* as guardian, by the orphan's court, unless he took upon himself the guardianship of plaintiff, in pursuance of that appointment, would not support defendant's plea; or *the appointment of Nutz as guardian for the purpose of instituting the ejectment in Northumberland county, and his instituting that ejectment without taking upon himself the guardianship of plaintiff's other property, would not support defendant's plea.* If *George K. Nutz* took upon himself the guardianship of plaintiff's estate, this suit cannot be supported. Defendant in that case must be cited to settle his account of his guardianship in the orphan's court."

On the trial of the cause, a number of bills of exception were taken to the opinion of the court upon points of evidence and other matters which occurred; after which the court were requested by the counsel for the plaintiff in error to instruct the jury on various questions of law. All these things have been assigned for error, but have been passed by, with the exception of the opinion of the court below as to the maintenance of this action against the plaintiff in error, and the charge of the court on the point of his guardianship.

The questions were argued by

M'Cormick and *Wideman*, for plaintiff in error.
G. Fisher, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—In regard to the first question, I consider it a well settled principle, that a wife can not be joined with her husband as a defendant in an action founded upon a contract or promise either express or implied, except where she has made the contract or promise, or done the act from which it is to be implied, before coverture; and that in every such case the wife must be joined in the suit with the husband. *Robinson* v. *Hardy*, 1 *Ves.* 281, 440; *Drue* v. *Thorn*, *Alleyn* 72; *Mitchinson* v. *Hewson*, 7 *Term Rep.* 348. Neither at law nor in equity will the courts take cognizance of distinct and separate claims, or liabilities of different persons in the same suit. 1 *Chitty's Pl.* 8, 31. And therefore, in an action *ex contractu* against several, it must appear, on the face of the pleadings,

that their contract was joint, and that fact must also be proved at the trial; and if *too many* persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and if the objection do not appear upon the pleadings, the plaintiff may be nonsuited, or otherwise the court ought to direct the jury peremptorily to return a verdict against him upon the trial, if he fail in proving a joint contract. *Chitty, Pl.* 31. And upon this principle it has been holden, that an action can not be maintained against husband and wife upon a promise alleged to have been made by both during coverture; for as to the wife the promise is void, and therefore in law must be considered the promise of her husband alone, which is insufficient to support the action against the husband and wife jointly. *Risley* v. *Stafford, Palmer* 312. The propriety of joining the husband as a defendant with the wife in actions *ex contractu*, when the cause of action originated with the wife *dum sola,* is obvious; because, as the law makes him liable during the coverture for the fulfilment of all her engagements made anterior thereto, it would be repugnant to the first principles of natural justice that he should be condemned, or have a judgment rendered against him without an opportunity afforded of being first heard. But still in such suit the contract, or foundation of it, must appear to have originated with the wife alone while sole. And as the husband is only liable for such cause of action *during the coverture*, it follows necessarily that the moment that that tie is severed, either by the death of the wife or by the death of the husband, all liability of the husband, or of his estate, in that action ceases; if the wife, however, should happen to be the one that survives, the action survives also against her, and may be prosecuted to judgment and execution. See 1 *Bac. Abr. tit. Baron & Feme*, F. page 485; 3 *Mod.* 186; 2 *Com. Dig. tit. Baron & Feme*, 2 C. page 113 (*Kyd's Ed.*); 1 *Rolle* 351, *l.* 40. If the action then was properly brought by *Eliza Reutter* against *Nutz* and his wife, as no doubt it was, judging from the cause of action set forth in the first declaration, if he, *Nutz*, had not been previously appointed her guardian, the death of the wife abated the suit, and put an end to all liability on the part of *Nutz* in that suit. If, however, the plaintiff below had any good cause of action against *Nutz*, the husband, alone, she could not set it up on that action either before or after the death of the wife, beause no other than a cause of action which originated against the wife before marriage could be presented and made the foundation of a recovery in it. As well might it be contended that a plaintiff who has brought a suit founded upon a contract against a defendent who is unmarried at the time of commencing the action, but marries a woman while the same is pending, against whom the plaintiff has also a cause of action arising out of a contract made with her *dum sola*, shall be permitted, by the court in which the suit is pending, to add a count to his declaration embracing the cause of action against the wife. Such an amendment,

I presume, never yet entered into the head of any lawyer who had one, so as to attempt having it made. Chief Baron *Comyn* lays it down, that "if an action be brought by or *against husband and wife*, where it ought to be by or *against husband alone*, it will be error; or it may be moved in arrest of judgment. 2 *Comyn's Dig. tit. Baron & Feme*, Y. page 111, *Kyd's Ed.*

In conformity to this principle, it has been held that two actions, brought by the same plaintiff, one against the husband alone for words spoken by him, and the other against the husband and wife for words spoken by the wife, cannot be consolidated. *Swithin* v. *Vincent*, 2 *Wils.* 227. The court in that case delivered its opinion in the following words: "this cannot be done, for it would *be error to join the wife* in a declaration for words spoken by the *husband only*, and the declaration would be ill, either upon a demurrer or in arrest of judgment."

The first declaration filed in the cause under our consideration did not profess to make *George K. Nutz* liable, otherwise than by his having become the husband of *Mary Reutter*, against whom the plaintiff below alleged she had her cause of action; but it was no doubt the intention of the attorney of the plaintiff below, by his filing the new declaration, to spread on the record a cause of action that would charge *Nutz* individually, and in his own right; although I have my doubts whether he has done so; indeed, I am rather inclined to think that he has not stated a sufficient consideration in it to make *Nutz* liable individually, and in his own right. However, upon this I do not wish to be understood as giving any opinion by which I shall feel myself bound in the least degree hereafter. But admitting that it is such as it was designed to be, then it would be incompatible with the first, which must still be considered as a part at least of the declaration in the cause, for it was not asked of the court to be withdrawn, and certainly never was withdrawn. Hence the declaration may never be considered as consisting of two counts. In forming an opinion of the correctness of the proceeding in this case, we consider and judge of it in the same way as if the original parties to it were all still in full life, because every cause of action must refer to the original commencement of the suit, and if it did not exist then, or were not good, or could not then be made a good ground for recovery on the part of the plaintiff, it cannot become or be made so by any subsequent occurrence in that action. Now let us apply the ordinary test in such cases, in order to determine whether two counts can be joined in the same declaration in an action against a husband and wife, one charging him and the wife both in right of the wife, and the other charging him in his own individual capacity and right. Chief Justice *Wilmot* says, the true test to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment in both, and wherever there is the same judgment in both, he thinks they may well be joined. In this opinion the other judges concurred. *Dickson* v. *Clifton*, 2 *Wils.* 321; 1 *Term*

Rep. 276. It is evident that here the judgment in case of a recovery could not be the same on both counts, for on the first it would have to be a judgment against both the husband and wife, but on the second a judgment against the husband alone. As well might it be attempted in an action of debt against A and B jointly, to charge them in the first count of the declaration with a certain sum of money due from them to the plaintiff upon their joint obligation, and in a second count to charge A alone with the like sum due upon his several obligation. Yet such a thing has never been heard of.

We also think that the court below erred in their charge to the jury in regard to the appointment of *George K. Nutz* guardian of the person and estate of the defendant in error, and as to the effect of what he did under that appointment, whether it amounted to an acceptance of the guardianship generally or not. The charge of the court upon this matter was calculated, to say the least of it, to mislead the jury, by leaving them at liberty to consider the appointment of *Nutz*, a guardian of the defendant below, for a special purpose only, merely to bring and prosecute an action to recover a tract of land in Northumberland county, in which she had an interest. The words of the court are, "the appointment of *Nutz* as guardian, for the purpose of instituting the ejectment in Northumberland county, and his instituting that ejectment without taking upon himself the guardianship of plaintiff's other property, would not support defendant's plea." Now there was nothing in the evidence to warrant these remarks to the jury. There was no evidence of *Nutz's* having been appointed guardian but once. That appointment was general in its terms, and could not be restricted. It made him guardian of her person and all her estate, and if he did any act as guardian under it, it was an acceptance of the appointment generally, and he thereby became responsible as such. There being then no other evidence given of his appointment as guardian than the certificate from the clerk of the orphan's court, which showed that his appointment was general; and it being admitted that after that he had commenced and prosecuted an action of ejectment as guardian of the defendant in error: his authority to do so could only be derived from this appointment, and was conclusive evidence of his having accepted it, and the court below ought to have so instructed the jury. And as he therefore was entitled to receive, and must be considered as having received all the moneys, goods and chattels mentioned in the declaration in this action, to which the plaintiff below lays claim, as her guardian, and never having settled his guardianship account with the orphan's court, this action could not have been supported against him alone, or his personal representative, even had it been so originally brought. This has been settled and ruled by this court in the case of *Bowman* v. *Herr*, 1 *Penns. Rep.* 282.

The judgment of the court below is reversed.

Withers *against* Atkinson.

A witness having testified to what was sworn to before arbitrators by a person who was dead, and having said that his memory had been refreshed since that time by hearing the notes of the deceased witness's testimony read, it was held to be a proper question to ask, whether he had not heard the counsel who took the notes, say on oath, that they were not the notes of the evidence taken before the arbitrators, but made in his own office, of what he expected to prove.

In an action on an agreement for the sale and purchase of land, to recover the purchase money, the plaintiff can not recover, unless he has previously to the commencement of his action tendered a sufficient conveyance of the land.

A purchaser of land, who has given his bond for the purchase money, may retain for incumbrances, or for defect of title, although he has no covenant against incumbrances; but if the incumbrance be removed after suit brought, the vendor may recover, but must pay costs up to the time when the incumbrance was removed, and notice of it to the purchaser.

If a deed be altered after delivery, the alteration destroys the deed as to the party who altered it, but does not destroy the estate. If it contain covenants, the party loses all remedy on them, but the title is not divested. It is the instrument which is rendered void, not the estate.

ERROR to the district court of *Lancaster* county.

This was an action of debt on a bond, dated 1st April 1820, brought in the name of *John Fullmer*, assignee of *George Withers*, against *Ezekiel Atkinson*, and the defence was a failure of consideration. The defendant called *Isaac Bolton*, as a witness to prove what *William* and *Mahlon Atkinson*, who were then both dead, swore before arbitrators on a former trial of the cause; who said, that he could remember the whole substance of the testimony then given by those witnesses, which was, that they were subscribing witnesses to the bond; that the parties said it was for the land sold by *Withers* to *Atkinson;* that at the time the bond was given *Withers* declared that there was no judgment against the land. Upon cross examination the witness said, that his memory was refreshed on the subject of what the *Atkinsons* had sworn before the arbitrators, by having frequently since seen the notes of their evidence, as taken at the time by *George W. Jacobs*, Esq. the counsel of the defendant. The plaintiff then proposed to ask the witness, whether he had not heard *George W. Jacobs*, Esq. admit in court, when examined as a witness, that the only notes he had were memoranda of what he expected to prove, and which were here made in his own office. The defendant having objected to this evidence on the ground that Mr *Jacobs* was alive and competent to testify, it was rejected by the court, which formed the subject of the first bill of exceptions.

The defendant having given in evidence the bond, dated 1st April 1820, and the agreement between the parties for the purchase and sale of the land, dated 13th August 1818; with four receipts of different dates for payments on account of the purchase money, and

proof that *Atkinson* had gone into possession of the land in November 1818; offered in evidence a deed from *Withers* to *Atkinson*, purporting to bear date the 1st of November 1818, and proof by the justice who drew the same and took the acknowledgement of the grantors and their wives, that it was drawn, executed and acknowledged in the year 1819, and that "nineteen" had been erased and eighteen written upon the erasure, since the deed was executed and acknowledged. This evidence was also objected to, and the objection was overruled and the evidence given. It was also proved that the wives of *John Withers* and *George Withers*, both of whom were grantors, were yet living.

The defendant then gave in evidence fifteen judgments against *John* and *George Withers*, all entered previously to 1819, but all of which were satisfied before the trial of the cause, and some of them after its institution. It was also in proof that *Atkinson* had sold and conveyed a part of the land in 1822. These facts gave rise to several points which were made by the plaintiff and defendant, upon which they respectively asked the court to charge the jury.

The plaintiff requested the court to charge the jury:

1. That the date of the deed and its acknowledgement given by the *Withers* to *Atkinson* is not material; it takes its effect from *delivery*. If a deed of conveyance has a false or impossible date, or no date at all, it is nevertheless a good deed. If, therefore, the date of this deed was altered before delivery, it is still a perfectly good deed to *Atkinson* against the grantors; and if the deed has been altered by *Atkinson*, or with his consent, since he received it, or before he received it, he has no right to complain.

2. That the deed for the land which defendant has in possession, admitted by defendant to have been received by him on the 1st of April 1820, and kept, and the land held under it by him, (except the part he has sold) ever since, is the fulfilment and completion of the agreement of the 13th of August 1818, as to the conveyance of the land; and that the covenants in the article of agreement are carried into effect and merged in the deed, and cannot now operate to control or interpret it.

3. The defendant having been in possession and enjoyment of the land from 1818 up to this time, having received a deed for the land, having given the bond in suit for the balance of the purchase money on the 1st of April 1820, and having recorded that deed on the 12th of December 1821, and having sold a part of this land by deed, on the 15th of April 1822, cannot now object to the payment of the bond; because, he alleges, there were levies, by awards or judgments, at the time the deed was given, which remained undischarged or not removed at the time suit was brought, if they have been removed since.

4. That no liens or incumbrances now remain on this land.

5. That the transactions between men are taken to be fair, and done according to their mutual understanding, unless shown to be

otherwise; that fraud is not to be presumed or believed by a jury, without satisfactory proof.

6. That a defendant asking for equity, as a defence against a legal claim, must do equity; that it is *inequitable in a defendant* to ask to be relieved from the payment of his bond for purchase money of land which he had held and enjoyed under his deed for ten years and a half, up to this time, without being disturbed, or even asking for *further assurance*, or other indemnity under the covenants in his deed, merely on account of incumbrances of records which once existed against the lands of the grantors, but which are now and have long since been removed.

7. That the defendant, by his sale by deed recorded on the 15th of April 1822, of fifty-three acres of this land, to his son, has shown by a conclusive act that he did not intend to rescind the contract, and has put it out of his power to replace the grantors in the situation in which they were before the sale.

To which the court answered:

1. A deed takes effect from the delivery. The alteration of the date of this deed, and acknowledgement after the execution of them, if done by the grantor, or at his instance, is a falsification of the deed in a material part. If a deed of conveyance has a false date, or no date, it is, notwithstanding, good. If the date was altered by *Atkinson*, or with his knowledge and consent, he cannot complain.

2. Answered in the affirmative.

3. Answered in the affirmative.

4. If the jury believe that the judgments Nos. 2 and 13 were released, there are now no incumbrances.

5. Answered in the affirmative.

6. Answered in the affirmative.

7. This is for the jury. It is evidence; and, whether conclusive or otherwise, is for them to decide.

The defendant requested the court to charge the jury:

1. That as it is in express proof, that the bond upon which this suit is brought, was given for part of the purchase money of a tract of land, covenanted to be conveyed by *George Withers & Co.* to the defendant, clear of all incumbrances, except only the claim of the commonwealth, it is incumbent on the plaintiff before he can recover, to show that when he brought his suit he was in a situation to comply with the contract on his part, and convey the land to the defendant clear of all incumbrances, agreeably to the terms of the articles of agreement executed on the 13th August 1818.

2. That a vendor is bound to acquaint a purchaser with the incumbrances existing against the estate intended to be sold; and if he neglect to do so, he is guilty of a direct fraud, which vitiates and renders void the contract.

3. That where there has been direct fraud, or the adverse party has acted *mala fide*, the contract is void, and cannot be confirmed by any subsequent declarations or acts by which its fairness is acknow-

ledged. Therefore, if the jury believe that *George Withers*, the plaintiff, did not, at the time of obtaining the bond upon which this suit is brought, acquaint the defendant with the incumbrances existing against the land sold, and induced him to execute the bond and accept the deed, by falsely and fraudulently representing that the land was cleared of incumbrances; that there was not a judgment against him under the canopy of heaven; and that the deed was good: that this, *ipso facto*, avoids the bond, and that the subsequent recording of the deed can have no effect in reviving or confirming it.

4. That it is a principle of equity, that the parties to an agreement must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, or they will not be bound. And, therefore, if the jury believe, that on the 1st day of April 1820, the day on which the defendant executed this bond, he was not acquainted with the existence of the incumbrances against the estate he had bought, and was lulled into security, and prevented from making inquiry, by the false and fraudulent representations of the plaintiff *George Withers*, he is not bound by his contract, and the bond is void.

5. That it is a salutary rule, founded on morality and good policy, and which recommends itself to the good sense of every one, that no man ought to be heard in a court of justice, who seeks to enforce a contract founded in, or arising out of, moral or political turpitude, and if, therefore, the jury believe that the plaintiff, *George Withers*, obtained from the defendant the bond in suit, by the assertion of wilful and deliberate falsehoods, and by palming upon him an erased and altered deed, their verdict should be in favour of the defendant.

6. That an interlineation, if made after the execution of a deed, will avoid it, though in an immaterial part; the parties having no right to make the most trifling alteration after it has been acknowledged before a magistrate, appointed by law to take and certify the acknowledgement, in order that the deed may be recorded; and as it is in express proof, that after the acknowledgement by the grantors and their wives, before *James Black*, Esq. the erasures and interlineations in the deed, and the acknowledgement spoken of by him were made by *George Withers* the plaintiff, or through his instrumentality, that this avoids the deed *in toto*, and as the bond was given for land conveyed by the deed, the consideration of the bond has failed, and the money cannot be recovered.

7. That the rights of *femes covert* can be divested only in the manner pointed out by the laws of the land, and as it has been proved by *James Black*, Esq., the justice before whom the deed given in evidence by the defendant was acknowledged, *Elizabeth* and *Mary H. Withers*, the wives of two of the grantors, are still in full life; that subsequently to its acknowledgement, the deed was altered and erased by *George Withers*, or some one for him: this vitiates the conveyance as to them. And that as *Ezekiel Atkinson* holds the land subject to their rights, no indefeasible title clear of all incumbrances

has been given to him, agreeably to the articles of agreement of 13th of August 1818; and that consequently the consideration of the bond has failed and the plaintiff cannot recover.

8. That as it has been fully proved, that subsequently to the execution and acknowledgement of the deed given in evidence by the defendant, it was materially altered and erased by the plaintiff *George Withers* or his agent; this avoids the deed as to the other grantors; and, consequently, that *Ezekiel Atkinson*, in case of eviction, could have no redress against them upon the covenant of warranty contained in the deed.

9. That as the interlineations and erasures made in the deed by *George Withers* or his agent, subsequently to its execution and acknowledgement before *James Black*, Esq., avoid it as to the other grantors; their legal estate has never been divested, but remains subject to all liens and incumbrances existing against them.

10. That fraud vitiates every transaction; and if the jury believe that the defendant was induced, on the 1st of April 1820, to give his bond by the false and fraudulent representations of the plaintiff, respecting the non existence and removal of the judgments against the land, and the goodness of the deed brought to his house by *George Withers*, and was ignorant of the alterations and erasures in it, or of the effect of them in avoiding the deed as to the other grantors, that this avoids the contract and the money cannot be recovered.

Answer to the defendant's points:

1. The consideration of the bond is the deed of conveyance of the 1st of November 1818, and if at the time of trial all incumbrances are removed from the land conveyed, the plaintiff has a right to recover. The defendant relies upon equity in resistance of the payment of the bond, and if he has sustained no injury from incumbrances, and *now* can sustain none, because they are removed, his defence on this point fails.

2. Answered in the affirmative.

3. If the jury find the facts as stated in this point, the legal consequences follow, that the bond is avoided, and the mere recording of the deed will not revive or confirm it.

4. If the jury find the facts as stated in this point, and that the defendant was prevented from making inquiries, by false and fraudulent representations of the plaintiff *Withers*, the bond is void.

5. If the jury find the facts as stated in this point, the deed is void.

6. If the jury find the facts as stated in this point, the law is as stated therein; but if *Atkinson* knew of the alterations and erasures in the deed and acknowledgement, and waived making any objection to them, and accepted and recorded the deed, he cannot now set up as a defence those objections to the deed which he voluntarily relinquished.

7. An act of assembly establishes a method by which *femes covert* may convey their estates, or any interest which they have in land, and which, if correctly pursued, effectually conveys the estate or

interest of the wife. The signing and sealing and delivery of a deed, by a married woman, does not convey her interest, nor bar her dower, unless she has been separately examined by a magistrate, and a certificate made by him that the requisites of law had been complied with; this certificate, appended to the deed, is the most operative part of the conveyance as relates to the married woman; it is indispensable to the transfer of her interest and estate. The date of this certificate and acknowledgement was a material component part thereof, and if you believe the date inserted by the justice was erased from the acknowledgement, and another date inserted by *George Withers*, or any one at his instance, the acknowledgement is falsified and avoided, and the premises conveyed by the grantors is liable to the dower of their wives in the hands of *Atkinson* the grantee.

8. If the jury are of opinion, from the evidence, that the deed was altered in the date, after the delivery of it, by *John* and *Michael Withers*, two of the grantors, this avoids the deed as to them, and *Atkinson's* remedy on the warranty, in case of eviction, is gone.

9. Answered in the affirmative.

10. Answered in the affirmative.

The jury under this direction found a verdict for the defendant, upon which judgment was rendered. The errors assigned here were to the opinion of the court as contained in bills of exception, and in their answers to defendant's points.

Jenkins, for plaintiff in error.

The case presented is that of one who purchased land by articles of agreement, gave his bonds for the purchase money, went into possession, received his deed of conveyance, held that possession, and enjoyed the profits of the land for ten years, during which time he sold and conveyed a part of it, and now sets up as a defence to the payment of his bond, that an erasure and alteration were made by the vendor of the date of the deed, subsequently to its execution; and that judgments existed against the land at the time of the sale and delivery of the deed, although it is not pretended that he has been prejudiced to the amount of one farthing, and although those judgments were actually paid and satisfied at the very time the defence was making on the trial of the cause; and all this without offering or, indeed, having it in his power, to reconvey to the vendor, or place him in the situation he was. If this be an equitable defence, and sustainable only, in any case, upon the principle that he who seeks equity must do equity, assuredly it cannot prevail here.

Where a contract is executed, even in a case where fraud was practised by one of the parties, equity will not relieve unless the parties be restored to their original situation. 1 *Mad. Cha.* 330; *Sugd. Vend.* 480.

The court erred in their instruction to the jury, that it is the duty of a vendee to inform a vendor of the existence of judgments against him. The concealment of a fact, which any man of common sense

can discover for himself, is not a fraud; for it is the duty of a vendee to inquire for incumbrances where they may be found, if they exist. *Sugd. Vend.* 314, 308; 2 *Rawle* 90; 11 *Serg. & Rawle* 246.

The vendee made no objection to the deed until he was sued for the purchase money, but accepted the same, and held undisturbed possession under it for several years, without any notice to the vendor of a defect in it, or of his having any reason to be dissatisfied with it. This was an execution of the contract, and the agreement between the parties should not have been received in evidence. *Cook* v. *Cassel*, 8 *Serg. & Rawle* 268.

The question proposed to the witness, as contained in the bill of exceptions, was to test his credibility and accuracy; his memory was refreshed by certain notes of evidence; was it not very important to show, by the same witness, that he was informed from him who made the alleged notes, that they were not notes of evidence at all? *Norris's Peake* 269.

Montgomery, for defendant in error; who was requested by the court to confine himself to the effect of the incumbrances, and the representations of the vendor on that subject.

The articles of agreement between the parties expressly stipulated, that a title should be made clear of all incumbrances; and the proof in addition to this is, that the vendor, upon being inquired of by the vendee, declared that there was "not a judgment against him under the canopy of heaven;" when in fact judgments existed to the amount of 14,000 dollars against him. This was false and fraudulent. A purchaser has a right to call for information from a vendor; *Perkins* v. *Gray*, 3 *Serg. & Rawle* 327; and if given to him falsely, it is fraudulent; the mere concealment of it, where the purchaser had other means of information, may not be so. He is lulled into security, and prevented from inquiry by false representations. *Duncan* v. *M'Culloch*, 4 *Serg. & Rawle* 483; *Cook* v. *Grant*, 16 *Serg. & Rawle* 210; *Arnot* v. *Griscomb*, 1 *Ves.* 95; 2 *Page's Cha. Rep.* 390; 2 *Kent's Com.* 482.

The deed which the vendor palmed upon the purchaser was false, forged and fraudulent, and was not therefore an execution of the contract. Upon every principle therefore, this cause depended upon its merits, regardless of the deed, and should have been tried upon the rights of the parties, and the facts as they existed when the suit was instituted.

A witness can not be cross-examined as to an immaterial fact for the purpose of discrediting or contradicting him. *Buckley* v. *Ellmaker*, 16 *Serg. & Rawle* 72.

The opinion of the Court was delivered by

Huston, J.—I shall content myself with noticing those matters in this long record which are material to the cause trying. The first bill of exceptions contains matter which, if doubtful, ought not

to continue so. The witness was called to prove what two persons, now dead, swore before arbitrators in this cause at some time before 1825—1826, when the last of them died. There had been a former trial of this case in December 1828, at which the same witness had been called to prove the same matters in substance; viz. that these two persons had sworn, that at the time their father accepted the deed and gave the bond in question to *Withers*, he, *Withers*, had said there was not a judgment against him under the canopy of Heaven.

The witness at this trial was admitted, upon his swearing that he could remember all that the deceased witnesses had sworn. After his examination in chief, he, on his cross-examination, said, "I do not remember that, at a former trial, I testified, as now, on there being no judgments against *Withers;* but I remember now they did testify that before the arbitrators." After some more questions, to which he answered, he did not remember what any other witness than the two deceased swore, he said, "the reason why I remember what the *Atkinsons* swore and not the others, they were my neighbours, and frequently heard them mention it over since. The matter which principally strengthened my memory since is *George Jacobs's* notes, which I have seen frequently since;" and again, says, he saw *Jacobs* taking notes at the arbitration, and believes *Jacobs* took notes of all the evidence, &c.; that he saw those notes in *Jacobs's* office. The plaintiff then offered to ask the witness, Did you hear *George Jacobs* admit in court, when examined as a witness, that the only notes he had, were memoranda of what he expected to prove, made by him before the arbitration? The defendant objected; the court overruled the question, and exception taken; and this decision is attempted to be supported by saying *G. Jacobs* was alive and could have been sent for and examined. Most clearly the question should have been put. Mr *Jacobs*, or somebody else, had shown those notes to the witness, who had frequently read them, and impressed their contents on his memory, under a belief that those were notes of what the witnesses swore before the arbitrators, taken down at the time of swearing; but if Mr *Jacobs* had afterwards said much more, if he swore at the former trial of this cause that he had no notes of what witnesses swore before arbitrators, it would show that the witness had been shown as notes of testimony, writings which were no such thing; and if he did hear Mr *Jacobs* swear in 1828 that he had no notes, it is strange that he did not recollect it, when something purporting to be notes of the evidence was shown him, and more strange, that he would persist in calling them what he heard Mr *Jacobs* swear they were not.

But as the cause goes back, it is important that an opinion on the whole subject should be given. It is not, as a general rule, true, that a man called to testify what witnesses, sworn at a former trial, said, can refresh his memory by what a third person, or the witness himself, has since told him was sworn. He is called to testify, and can only be admitted to testify, what was said on oath in court; he can

not substitute for this what has since been said by the same person when not under oath, or said by any other person not under oath. The witnesses were dead before the former trial in 1828; he could have no conversations with them since their death, and his memory was not refreshed by any such means, he therefore says, his memory was principally refreshed by Mr *Jacobs's* notes, which he has seen frequently since. This is worse than the other. A witness cannot be permitted to refresh his memory by notes or memoranda made by any other person than himself, except perhaps in a case, where he looked over the writer, and saw at the time that what was written was written correctly; or where he, immediately after it was written, read it over and found it correct; and where he can positively swear, that the paper to which he refers to refresh his memory is the very one he saw written, or which he read immediately after it was written; and I make these exceptions with a *perhaps*. That matter is not before us, and not agreed; but it is out of the question, that a man who sees another taking notes of testimony shall be heard to testify what he did not remember until he read those notes. Where a man who took notes can refresh his memory by referring to them, or where he can read them, is settled by decisions of our own courts; but there is no decision, no principle, and I believe no *dictum*, that a man may in a case like the present refresh his memory by reading what was written by a third person, and not seen by the witness for years after it was written. If then this testimony had come out before the witness was examined in chief, he ought to have been rejected; and coming out afterwards, the jury ought to have been told to disregard it totally.

The next two bills of exception are taken without any cause. The agreement between the Messrs *Withers* and *Atkinson*, was made in 1818. The articles of agreement drawn by *G. Withers*, contain as full and fair covenants as can be devised. The agreement continued open till April 1820, *Atkinson* having taken possession in November 1818, and making partial payments every two or three months. It must then be perfectly immaterial in this stage of the cause, and in every other, whether the contract commenced in consequence of *Atkinson* proposing to purchase, or in consequence of *Withers* proposing to sell; and it must be equally immaterial whether *Withers* advised *Atkinson* to purchase, or did not advise him; and yet these are made the subject of two bills of exceptions.

Before I come to what is called the important point in the cause, it must be understood that Mr *Black* was employed to survey the land and draw the deed, and did both. He was offered to prove, that since the deed was executed, an alteration had been made in the date of it; or, in other words, to prove that it was drawn and executed in the year 1819, whereas, it now purports to have been executed and acknowledged 1st November 1818. This testimony was objected to, but admitted and exception taken. It was rightly admitted; he was the scrivener who drew the deed; one of the subscribing witnesses to it, and the justice of the peace before whom it was acknowledged. The

evidence, when admitted, was most unsatisfactory; he was twice examined; he swore positively that the deed was drawn and executed in 1819; but on what day, or even in what month, he could not tell. There were three grantors, *Michael Withers*, *George Withers* and wife, and *John Withers* and wife. The parties lived ten or twelve miles apart, and he took the acknowledgement of *George* and wife on one day; *John* and wife on another day, and *Michael* at a different time and place: yet the acknowledgement was but one, and purported to have been all of the 1st of November 1818. *John Fullmer* was the other subscribing witness, and rode round with him, and saw all of them acknowledge as well as the justice did. I do not say there was really any thing wrong or very uncommon in this; a different course, however, might have been taken. *Atkinson* was not present, and the deed was not then delivered to him; it was delivered to him on the 1st April 1820, when he paid some more money, and gave the bond on which this suit is brought. In drawing the deed, the scrivener had left a blank for the day and month. As the deed was, these were filled with 1st November; and at the examination he thought this was done in the deed by *G. Withers*, and in the acknowledgement by *J. Fullmer*, and this at the time the deed was executed. Afterwards, he was called again, and says, "I cannot say precisely when the deed was acknowledged, except from the date in the deed. The reason why I believe the date in the deed was altered, was because I have never been in the practice of antedating any deed which has been executed by me. I am under the impression the deed was left blank, it was not dated 1st November 1818: as respects the year, I have no doubt; it was in the year 1819 it was executed." Immediately after, he says, "I have thought on this matter, and have endeavoured to recollect the truth; the word 'November' was written at the time I drew the deed, and not at the time I took the acknowledgement;" and again he says, "the date in the acknowledgement was filled up by *Fullmer* at the time I took the acknowledgement."

It was apparent the letters "eigh," in the word eighteen, were written on an erasure. This was not discovered at the trial of this cause before arbitrators, nor till five or six years after the commencement of it. Many men of more experience, and as careful as Mr *Black*, have witnessed deeds and taken the acknowledgement of the grantors and their wives, without ever looking at the date of the deed; and it was no imputation on his integrity that he did not look at it; nor was it any imputation on his memory, that in 1830 he could not recollect all that he knew in 1819. I shall show that this matter was not so material as seems to be supposed by the complainants. It was assumed, but without very conclusive evidence, that the word *nineteen* had been changed to *eighteen* in the date of the deed, since the execution and acknowledgement, and that it was done by *G. Withers*, or by *Fullmer*, who was in his employ. Now the only proof was, that *Fullmer* had been in *Withers's* employment some years before. *Fullmer* was dead before this discovery was made. When

Atkinson was able to pay what he had agreed as the first instalment, viz. 1st April 1820, the deed was given to him, and he gave his bond for the residue of the purchase money; soon after he took the deed and had it recorded; it was then as it is now.

The first witness, on whose admission I have commented, swore that at the trial before arbitrators, two sons of the defendant were examined, and proved that when *G. Withers* brought the deed to their father on the 1st of April 1820, and when defendant executed this bond, *G. Withers* said there was not a judgment against him under the canopy of heaven; and there were many judgments against him, as appears by the records produced; though it was admitted none of them had ever been levied on this land; and also, that before the trial all were paid and satisfied.

On the other hand it was proved, and at length admitted, that *George Withers*, at the time the deed was delivered and the bond given, did tell *Atkinson* there were two large judgments against him, and also delivered to *Atkinson* a release of the tract in question, from the lien of those judgments. Every thing was denied, and testimony given after a very tedious trial, proving all alleged on one side, and the other, if believed.

As is the custom here, certain propositions were stated to the court, on which they were requested to lay down the law to the jury.

The first point made by defendant's counsel was rightly abandoned here. The law on that subject is settled by this court in *Cassel* v. *Cook*, 8 *Serg. & Rawle* 293, and many other cases. Where the suit is on articles of agreement, before deed delivered and bonds given for the purchase money, before the plaintiff can demand the money or recover the penalty in debt for the money, it behoves him to tender a good and sufficient conveyance. It is different after a deed is delivered and accepted, and a bond is given for the purchase money, which is itself at law a consideration; and where the obligor must go into equity for relief, if the consideration has failed, or the contract has not been complied with.

The second, third and fourth points are in substance the same, and assert that the vendor is bound to acquaint the purchaser with incumbrances; and if he do not, or if he informs him falsely, he is guilty of a deceit: that if the vendor states an untruth as to this matter, the contract is void, and cannot be confirmed by any subsequent declarations or acts by which its fairness is acknowledged; and if this was the case here, the facts, that *Atkinson* took possession of the land, has enjoyed it ever since without molestation from any one, and has sold part of it, do not alter the case, or make him liable to pay the purchase money.

There is no subject on which we find so much in the law books as the fairness of contracts; and if we were to judge from their arguments in court, no subject on which men of talents and learning have such vague and strange opinions. The above is a fair statement of the positions laid down in this cause: which seem to blend the

case, where a man, who has been guilty of fraud in making a contract, seeks to carry into effect such fraudulent contract, without rectifying or allowing for the advantage he has obtained; with cases where the contract has afterwards been completed by both parties, and where the defect complained of was remedied and removed by him who concealed it before the other suffered from it, nay, before he knew of it. It seems also to blend the cases under and within the statute of fraudulent conveyances, which declares deeds within its provisions utterly void and of no effect against creditors, with frauds in other cases, in which Lord *Coke* tells us, the common law rectifies what is amiss and leaves the rest as the agreement left it. I certainly do not intend to be the apologist of fraud or misrepresentation in contracts, or in any situation in life; but, except in this and the two adjoining counties, I have never heard it contended, that if a man in selling a tract of land made any wilful mistatement repecting it, although no injury has resulted to the vendee, that he thereby forfeited his tract of land, and that the right to it at once vested in the person to whom he stated the falsehood, without the payment of any purchase money. When a contract is avoided for fraud, it is avoided throughout; it is as if it had never existed; and the property is in the vendor as if no such contract had ever been made; and the vendee if he has paid money recovers it. This applies to contracts not completed, more generally than to those which have been carried into effect; and there are very few instances in which it can be applied to cases in which the purchaser has received the possession and cannot restore it to the vendor. In such case the purchaser is compensated by recovering damages for the injury he has sustained from the misrepresentation. Without attempting to write a system upon conveyancing, and upon the effect of fraud on contracts executory or executed, I will refer to a few authorities and principles which will settle this case. In the first place, the books are full of distinctions between defects and incumbrances on an estate which are secret, and those which are open and palpable, which a purchaser can discover, if he will look for them, and the difference between the register counties in England and the other counties, in the former of which the purchaser can find all or nearly all possible incumbrances. *Sugden* states, that although the vendor or his agent states there are no incumbrances, or none but such as he has given a list of, yet it is proper to search for judgments and mortgages immediately before the deed is executed. *Sugd. Vend.* 302. Next he tells us, if an incumbrance be discovered before the deed is executed and delivered, and the purchase money paid, the vendor must discharge it, if the vendee so insist, whether the purchaser has or has not agreed to covenant against incumbrances; or the vendee may refuse to accept the deed, and in case of false representations may recover any expenses incurred in the course of the purchase. *Sugd. Vend.* 312. Or if he has accepted the deed, the purchaser, if he has not paid, may retain the purchase money until the

incumbrance is paid off. *Sugd. Vend.* 312. So if the purchaser had paid the money, but deeds are not completed, he may refuse to accept the deed, or to enter on the land, or if he has entered, may restore the possession and sue for his money; and this though he was not entitled to a covenant against the incumbrance discovered; but, if the deed has been executed, and the money all paid, and the covenant in his deed do not extend to the incumbrance as a defect of title, he is without redress. If the covenants do extend to it, his remedy is on them. The writer then discusses a point immaterial in this country, viz. whether, after having accepted the deed and given bonds, the purchaser can retain for incumbrances not discovered by him, and against which he has no covenants; and he comes to the conclusion that he cannot at present in England, unless he can prove that the vendor knows of the incumbrance or defect; and then he may recover compensation at law by an action on the case, or have relief in equity. But there is no intimation there, or any where else that I know of, that the damages at law or the relief in equity is more than compensation for the injury; and of course, if no injury, as in this case, where the vendor paid off the incumbrances before any injury was sustained, nay, so far as we know, before he was threatened with injury, the compensation would be what the injury was, that is, nothing.

I have said that this discussion is not material here; because it is now settled in this country, as it was formerly in England, that the purchaser may retain for incumbrances or for defect of title, where he has not paid the purchase money, even though he has given bonds for it. See *Steinhauer* v. *Witman*, 1 *Serg. & Rawle* 438, 447. *Hart* v. *Porter*, 5 *Serg. & Rawle* 204. This last case has settled also what ought to have governed this case on this point, viz. that until the incumbrance is removed, the purchaser may defend himself, though he has no covenant against incumbrances; but, that if the incumbrance is removed after suit brought on the bonds of the purchaser, from that time it ceases to be a defence to the purchaser, and the vendor can recover on his suit, but must pay the costs up to the time when the incumbrance was removed, and notice of it to the purchaser. This case has been repeatedly recognized since. I shall notice the alleged dower in the wives of *John* and *George Withers* hereafter.

The fifth, sixth, eighth, ninth and tenth points relate to the alterations alleged to have been made in the deed; as does also the seventh, which I shall notice separately.

These points, in substance, amount to this; that any alteration in a deed avoids it, without inquiry who altered it, if the alteration is made after acknowledgement before a justice, though before delivery; and in an immaterial point, still it avoids it, and releases the defendant from payment of his bond; that the alteration by *George Withers*, or by his procurement, avoids it, as the deed of *John* and *Michael Withers*, and *Atkinson* would have no remedy against them on his

warranty; that the alterations leave it subject to all liens to this day against *Michael* and *John Withers;* and that the delivery of such altered deed to *Atkinson* was a fraud, and discharged him from all liability to pay his bond. This is a full summary of the points, except that the counsel request the court to state that the facts, as well as the law, are as they state them.

The subject of alteration of deeds is a wide field, into which I do not propose to enter further than this case requires; because the only evidence that this deed was altered, as to its date, is, when fairly examined, no more than just this; that Mr *Black* at that time did not look at the date in the deed, or if he did, he does not now remember it; and his impression is, that if he had seen the date he would have objected to it; and because, in the view I shall take of this matter, it has little bearing on this cause. I shall say, that I approve of the modern cases, which do not destroy a deed because the mice have nibbled off the seal, or because accident has defaced a part of it, or fire or water destroyed it. We have provision in our laws for supplying the loss of a deed.

I also argue that the courts ought so to decide, that every man who is a party to a deed should be deterred from any alteration in it after it has become a deed, by *making it void, as to him who altered it, and leaving it effectual to vest the estate of the other party.* In short, that when a jury find that one of the parties has altered a deed, after it became effectual by delivery, he shall never support a suit on that deed. But that, although the deed is altered after delivery by the grantor, and although he thereby loses all benefit of the covenants contained in it, still the alteration does not vest the estate in the grantor. This doctrine is not only well established by ancient and modern authorities, but consonant to reason. If the owner of a deed alters it in any way, it becomes void as to him. *Pigott's case,* 11 *Co.* 27; *Shep. Touchstone* 57, 68, 69. The modern cases say, an alteration by a stranger, though material, will not have this effect; *Jackson* v. *Malin,* 15 *Johns.* 297; *Rees* v. *Overbaugh,* 6 *Cowen* 746. But altering the deed by the grantor operates not to divest an estate which has passed by it. "A deed of revocation, and a mere deed of settlement by that deed, though after the sealing and execution blanks were filled up in said deed, and deed not read again to the party, and not resealed and executed, yet held a good deed." *Paget* v. *Paget,* 1 *Rep. in Cha.* 410. I have quoted the whole of this case, and I understand it as deciding the deed good to pass the estate; it is so understood by the annotator to *Co. Lit.* 225, 226, and is the case there referred to as being in 1 *Rep. in Cha.* 100; but at page 100 there is nothing on that subject. And in more modern times, in *Hatch* v. *Hatch,* 9 *Mass. Rep.* 311, we find the same doctrine; and *Lewis* v. *Payn,* 8 *Cowen* 71; and the cases there cited, some of which I have examined, and others I could not, at this time. I establish this position, that if a deed be altered after delivery, the alteration destroys the deed as to the party who altered it, but does not destroy

the estate. If the deed contain covenants, the party altering it loses all remedy on them; but the title is not divested. I omit the distinction, taken in *Lewis* v. *Payn*, as to incorporeal rights which lie in grant, and estates passing the realty, as not material here. In that case there were counterparts, each executed by both parties, one of whom altered the part in his possession, and would have lost all remedy on it if that had been the only deed, but his right was saved by the other deed, which remained unaltered.

It would indeed be strange, if the grantor of a tract of land could make the title void as to the purchaser, by altering the deed after execution, and before delivery, so that it would pass for nothing, and leave the land for his heirs or creditors, after he was paid for it; and this in consequence of his own act. If it contained covenants in his favour, he would lose all benefit from them; but it does not revest the estate in the grantor, nor take from the purchaser the benefit of any covenants in his favour. So if the purchaser alters the deed after it is delivered to him, he loses all benefit from the covenants in his favour; but it does not destroy his title, or revest the estate in the grantor. The case in 8 *Cowen*, just cited, is full to show that *it is the instrument altered* which is rendered void as to any benefit to be derived to the party who altered it; and that, where he has no other evidence to support his claim than the altered deed, he could not recover, having by his own act destroyed the evidence of his own demand; but that if he has other evidence of his claim, besides the deed he has erased, or to which he has made an addition, he may recover on that other evidence. There the landlord had altered the lease by a material addition, and would have failed in recovering the rent claimed on that lease, in that suit, but for the production of the counterpart by the tenant. The common pleas decided that he had lost his rent entirely; the supreme court corrected that decision, and said he could recover on the counterpart. And the principle of that decision, and of all the cases cited, is, that even admitting the date to have been changed after the execution and acknowledgement, but before delivery, the alteration does not affect the estate of *Atkinson* the purchaser; and that the alteration of the deed does not avoid any other instrument relating to the same estate, except the identical one altered. The bond then remains as good as ever, and ought to be so; if the estate of *Atkinson* is unimpaired, why should he not pay the purchase money?

But it is said the alteration by *George* avoids it as to *John* and *Michael*. Now *George* was either their agent, entrusted by them to keep and deliver the deed, in which case his act is their act, and will no more avoid the deed as to them, or prevent the estate passing from them, than from passing from himself. Or he was not their agent, and not entrusted by them, in which case it is an alteration by a stranger, as respects them, and the alteration will affect no one; especially as, under the circumstances of this case, it was a perfectly immaterial alteration. This view of the case makes it unnecessary to

say whether—as a deed passing land has no validity until delivered, and is, until delivery, of no value, and has no effect or operation—it may not be altered by the grantor at any time after execution and before delivery; and whether, if this were fully proved, it would have any effect on the validity of the deed for every purpose. Some of the cases cited seem to put it on being an *alteration after delivery*, and as it is no deed until delivered, I see no reason why the law should not be so; but the point was not argued—is not necessary to be decided, and I choose to give no opinion on the subject.

It remains to notice the seventh point proposed to the judges, as to the effect of the alteration, if made after the acknowledgement on the estate and interest of the wives of *John* and *George Withers*. The deed, independent of their acknowledgement, does not pass the estate of the wives; if it is not as it was at the time of the acknowledgement, then it is not the deed they acknowledged, and their estate would not pass. This I say in consequence of the case in *Burrow's Reports*. If it were not for that case, I could not find any very good reason why—if the land, and consideration, and estate granted, continue the same, and these are the only matters material in their examination which ought to be known by them, or made known to them—their estate should not pass, by reason of an immaterial alteration unknown to them; but I am contented that case may stand as an authority, and in this respect there was a defence to the bond. But by the decision of *Hart* v. *Porter*, 5 *Serg. & Rawle*, before cited, and since repeatedly recognized, the plaintiff, on procuring new deeds of release, by *John* and *George*, and their wives, duly acknowledged, and delivering them to the defendant, can recover in this suit, on paying the costs up to the time of delivering the release; or he may discontinue, and, after delivering such releases, recover in another action on the bond.

The law on the effect of misrepresentation as to incumbrances, and as to the effect of the alteration, even admitting that it was made by *G. Withers*, or by *Fullmer* at his instance, was not correctly stated, as applied to the facts of this case.

Judgment reversed, and a *venire facias de novo* awarded.

Longenecker *against* Zeigler.

Upon the receipt, by a plaintiff in a judgment, from the sheriff, of more money out of the proceeds of the sale of real estate than he is entitled to, an action can not be maintained in the name of the defendant whose property was sold to recover it back, although brought for the use of another creditor, who would be entitled to receive it from the sheriff. The action should be in the name of the sheriff. Whether such action could be maintained in the name of a creditor entitled to the money (*Quære*).

ERROR to the district court of the city and county of *Lancaster*. *Hays*, president.

This action for money had and received was brought in the name of *Christian Longenecker* for the use of *Samuel Bossler* against *Conrad Zeigler*, and arose out of these facts. *Longenecker* became indebted, and judgments were obtained against him by several persons, and among others by *Conrad Zeigler* the defendant: his real estate was levied and sold by the sheriff, and of the proceeds of the sale, *Zeigler* received, in satisfaction of his judgment, 1774 dollars; he had previously received, from the defendant interest on account of his claim, which had not been credited on the judgment, so that he received about 250 dollars more than he was entitled to, and it was to recover this sum back that this action was brought. *Samuel Bossler* was a judgment creditor to whom the money would have been appropriated if *Zeigler* had not received it improperly. The only question of importance presented to the court, was, whether the action was rightly brought in the name of *Longenecker* for the use of *Bossler*. The court was of opinion that it was not, and rendered a judgment for the defendant, which was the error assigned.

Jenkins, for plaintiff in error.
Heckert, for defendant in error.

PER CURIAM.—The name of *Longenecker* was used as the legal plaintiff under a supposition that he had the legal title. But in this species of action, which, in substance, is said to be a bill in equity, there is no distinction between legal and equitable title, he being the legal party who is entitled to the money. But *Longenecker* was not entitled beneficially or even as a trustee for the creditors, for the law is not so unreasonable as to attribute to him the ownership of what it has itself divested him and appropriated to the extinguishment of his debts. Who then was entitled to the money here? The sheriff's is the hand to pay out, and a mispayment may undoubtedly be recovered back by him in an action founded on the special property which he has in the money, as the bailee of the law; so that the

action here might have been brought with perfect safety in his name. It might also, perhaps, have been safely brought in the name of *Bossler*, the creditor ultimately entitled; for, though there is no privity between him and the defendant, the money, when it has been received *mala fide*, may be pursued specifically on the owner's right of property. Here there would seem to be enough in the case to authorize a jury to find that the money was received *mala fide;* or perhaps, a legal presumption to that effect would necessarily arise from the facts. But all difficulty on this and every other ground would have been avoided by proceeding in the name of the sheriff.

Judgment affirmed.

Hart *against* Yunt.

A list of and abstract from a number of receipts made by a third person, and which the parties, at the time it was made, admitted to be right as credits in their setlement, is not competent evidence to go to the jury on the part of the defendant who has the original receipts in his possession; the receipts themselves must be produced.

ERROR to the district court of *Lancaster* county. *Bradford*, president.

In an action for money had and received by *Daniel Hart* against *George Yunt*, the defendant called a witness to prove that he had met the parties at their request, and examined their papers; that he had made a list of receipts for money which they both admitted to be right as credits in their settlement. The witness produced the list and the defendant offered to read it to the jury, to which the plaintiff objected, but the court overruled the objection, and the paper was read. The admission of this evidence was the subject of a bill of exceptions, and was assigned for error here, and argued by

Hopkins, for plaintiff in error.

Rogers and *Jenkins*, for defendant in error, cited 1 *Phil. Ev.* 78.

The opinion of the Court was delivered by

KENNEDY, J.—The court below erred in admitting the defendant to give in evidence to the jury the written memorandum made out by *George Duchman*, of receipts alleged to have been given by the plaintiff to the defendant for moneys received of him at different times in discharge of the demand or claim, for the recovery of which the plaintiff brought this action. *Duchman* testified that he made this memorandum out from the receipts which were then in the possession of the defendant, and produced by him, read over by him and agreed to by the plaintiff. It is obvious that this memorandum thus

made could not in any point of view be considered or be claimed to be better and more satisfactory evidence than a copy of the receipts would have been, after having been proved by the witness to be a true copy of them. Now can it even be pretended for a single moment that copies of writings, which appear not only to have been in existence, but to have been in the possession of the very defendant himself, ought to be substituted for, and permitted by the court to be given in evidence by him to the jury instead of the originals? This would be in direct violation of a rule that is considered universal; and than which none is better established: that the contents of a writing under such circumstances can not be proved by a copy. *Stark. Ev.* part 3, sec. 10, page 390.

Among other things, it is said that the foundation of this rule is a suspicion of fraud. For if it appear from the very nature of the transaction, that there is better evidence of the facts proposed to be proved, which is *withheld*, a presumption arises that the party has some secret and sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were to be afforded, his object would be frustrated. *Ibid.*

But what tends to make the suspicion of fraud in this case still stronger is, that this memorandum of the receipts admitted in evidence is not in fact a copy of them, but falls far short of it. It is barely a brief abstract from them, showing the amount of the sum of money mentioned in each, without designating on what account or for what purpose the money was received: and I am inclined to think could not legally have been admitted as a substitute for the original if they had been lost or destroyed. It no doubt might have been used by the witness *George Duchman* to refresh his memory in proving the contents of the receipts, had he been called on for that purpose in case of their loss or destruction; and this is the most, as it appears to me, that could have been made of it.

There is nothing in the two remaining errors which have been assigned. The judgment of the court below is therefore reversed on the first error assigned; and a *venire facias de novo* awarded.

Judgment reversed, and *venire facias de novo* awarded.

Hess's Appeal.

An appeal from the decree of the orphan's court, ordering a sale of real estate for the payment of debts, is a *supersedeas* to such sale.

APPEAL from the orphan's court of *Lancaster* county.

This is an appeal from a decree of the orphan's court of the county of Lancaster, confirming a sale made of the real estate of *John Hess* deceased, by his administrators, for the purpose of paying his debts; in pursuance of a decree previously made by the same court. The order for the sale was made on the 30th day of December 1828, directing the administrators to sell on the 24th of January then next following, and to make report of the same to the court on the third Monday of March ensuing. On the 22d day of January 1829, two days before the day on which the administrators were directed to sell, the appellants in this case, who were the heirs of the deceased, by their guardian entered and in due form of law took an appeal, from the decree of the orphan's court ordering the sale, to the circuit court, where it was affirmed; and from this decree of the circuit court, an appeal was taken again to this court, where the decree of the circuit court was affirmed. After the appeal was taken from the order of the orphan's court decreeing the sale, and while it was still depending, the administrators went on and made the sale, and reported it to the orphan's court agreeably to the order. Exceptions were taken and filed against the confirmation of the sale; and among them was this one; that the sale was made after the appeal was taken from the decree of the orphan's court, which had authorized it, and while that appeal was still pending and undetermined. The other exceptions were either not supported in point of fact, or not tenable in law. The orphan's court, however, overruled them all, and confirmed the sale; and it is from this decree of confirmation of the sale that this appeal was taken.

Champneys, for appellant, cited the acts of 1st of April 1811, sect. 2; and the 27th of March 1813, sect. 9; and the 19th of April 1794, section 20; and contended that the appeal was a *supersedeas*. To determine that it was not, is equivalent to a determination that no appeal from a decree of the orphan's court can be taken at all; for the land once sold, and the title made, any result of an appeal was ineffectual.

Jenkins, for appellee. The decree of the orphan's court was not final until the confirmation of the sale; this appeal, therefore, was

taken too soon and should be quashed. But upon the examination of this record, the court will find nothing wrong: why then reverse proceedings thus regular, because of the formal reason that the sale was made after an appeal? If the court be now of opinion, that there was no ground for the appeal, they will not reverse the decree. 4 *Serg. & Rawle* 202; 2 *Mad. Chan.* 455; 6 *Serg. & Rawle* 462; 4 *Dall.* 160.

Champneys, in reply. The difference between an appeal and writ of error is, that error lies only to final judgment; appeal lies to interlocutory decrees. Both operate as *supersedeas*. 16 *Serg. & Rawle* 329.

The opinion of the Court was delivered by

KENNEDY, J.—To support this sale and the decree of confirmation by the orphan's court, it has been contended in the first place, that the appeal from the order of sale was not a *supersedeas* to the execution of it; and that the administrators had a right, if they chose, to go on with the sale notwithstanding, taking the responsibility of it upon themselves; and if it turned out afterwards that the order for the sale should be affirmed upon the appeal, that then the sale would be good, whatever might have been the effect of its reversal. This notion, I apprehend, is contrary to what has ever been considered the effect of an appeal duly and regularly taken from the decree or judgment of an inferior tribunal or court to a superior. The effect, if not at once to open and annul such decree or judgment of the inferior tribunal or court, so that the proceedings to be had in the appellate jurisdiction shall begin *de novo*, has at least been to stay all further proceeding in the execution of it. It is very reasonable that it should be so, or otherwise the great end of granting to the party the right to appeal, would in many cases be lost. How, for instance, could an appeal taken from a sentence of death avail the party any thing, if the sentence may notwithstanding be lawfully executed pending the appeal. It may be said that this is an extreme case. But surely it must be admitted that the object of granting the right of appeal in every case is to afford the party an opportunity of obtaining relief from the execution of a sentence, order or judgment that is illegal or unjust; and yet if such sentence, order or judgment may be lawfully carried into effect before a decision shall be had upon the appeal, it is very apparent that the primary object of the appeal would be lost in all cases, and that in many, if not in the most of them, great injury would be the result, for which no adequate compensation could be made by any decision that could possibly be given upon the appeal.

Even in the case now under consideration, where the order for the sale of the estate was held on the appeal to be lawful and just, yet it is possible that the appellants may have sustained a serious injury on account of the sale having been made while the appeal was depending. It being finally determined that the property must be sold, it

then became the interest of the appellants, that the highest possible price that could be obtained for it should be had. But the circumstance of the appeal having been taken, and made too, under the solemnity of an oath, may reasonably be supposed to have created doubts in the minds of some, who might otherwise have been disposed to buy the property, as to the final issue of the appeal, whether the order for the sale would be affirmed or not; and consequently made it uncertain with them, whether they would get it, if they did bid and it should be stricken down to them; and as nothing but the final decision upon the appeal could remove such doubts, they did not bid at all, although disposed to give a much higher price for the property than it was sold for.

It is a desideratum with all who wish to purchase property, to be certain and assured at the time of buying, that they will get it according to the terms of their agreement, so that they may make their arrangements accordingly, and not be disappointed. Suspense, doubt and anxiety, are all unpleasant, and there are few who do not wish to avoid having their minds so possessed. Beside, if an appeal is not to be considered at least a *supersedeas* or stay to the execution of the sentence, order or judgment from which it is taken, useless and unnecessary costs must often be incurred, which ought to be avoided as much as possible.

It has in the next place been urged that the order of sale, made by the orphan's court, was merely *interlocutory* and not *definitive;* and therefore, not such a sentence as could be lawfully appealed from: and as the appeal from it was not authorized by law, it was a nullity and could have no legal effect or operation whatever in arresting or staying the execution of the decree for the sale. This, perhaps, might be so, if the order for the sale were not of a *definitive* character, for it is only from *definitive* sentences or judgments passed by the orphan's court, that the right of appeal is given, according to the 9th section of the act of the 27th of March 1713. But it appears to me that the order of sale must be considered a *definitive* sentence. It was a judgment of the orphan's court, condemning the property to sale without any further hearing to be had on the subject, and nothing remained to be done, but to carry it fairly into execution. It was literally a decree, by force of which, and its due execution, the owners of the estate were to be divested of all right to it. Could any thing, then, in its nature be more *definitive?* And if it had been erroneous, I think that the most appropriate time for taking the appeal was before its execution, in order to prevent all useless expense as far as practicable, and likewise a possible sacrifice of the property for which no adequate reparation could be obtained after a completion of the sale. Such orders I believe have been generally considered as appealable from. It was so looked upon in the present case, and sustained without objection, and acted upon both by the circuit court and this court, as if it had been rightfully taken.

[Hess's Appeal.]

Under this view of the matter, we consider the sale made by the administrators, and the subsequent confirmation of it by the orphan's court, erroneous, and both are therefore set aside and reversed.

Decree reversed.

Stoever *against* Immell.

An order of the court approving and receiving a bond from a surviving trustee of an insolvent debtor, conditioned for the discharge of his duty, is not examinable in the supreme court.

A proceeding which is imperfect when the act of assembly under which it was begun expires, cannot be perfected: what is done afterwards is void.

APPEAL from the common pleas of *Dauphin* county.

In 1810, *Frederick Stoever* was discharged as an insovent debtor, and *Michael Steckbeck*, *Leonard Immell* and *Anthony Kelker* were appointed his assignees. In 1830, the creditors applied to the court to permit and direct a bond to be given and filed by *Leonard Immell*, the surviving trustee, conditioned for the faithful discharge of his duty, which was objected to, and the objections overruled and the bond given, from which order the administrators of *Tobias Stoever* appealed, and removed the record by *certiorari*.

Hopkins and *Elder*, for appellants, cited act of 4th April 1798. 1 *W. Black.* 451; 3 *Burr.* 1457; 6 *Binn.* 455; 6 *Cra.* 329; 7 *Wheat.* 550; 1 *Cra.* 282; 4 *Dall.* 378; 4 *Yeates* 392; 10 *Serg. & Rawle* 436; 11 *Serg. & Rawle* 325; 5 *Serg. & Rawle* 549.

Fisher and *J. A. Fisher*, contra, were stopped by the court.

Per Curiam.—If the proceeding were imperfect when the act under which it was begun expired, what has been done since is simply void, and needs no reversal. It has, however, not been thought to be directly examinable here. The books show no instance of it, and we are satisfied the present attempt cannot be sustained.

Writ of *certiorari* quashed.

Fisher *against* Kean.

In an action upon articles of agreement for the purchase and sale of land, the jury found a certain sum due and payable by the defendant, and another sum not due until the death of a widow, but a lien, and chargeable upon the land; executions having issued on the judgment, the money made by the sale of other land, and brought into court for appropriation; the court ordered the money payable presently by the terms of the verdict, to be paid to the plaintiff, that which was payable upon the death of the widow to be paid to another creditor who had a mortgage on the land sold, and that mortgage to stand for the use of the plaintiff *pro tanto*. *Held*, that such decree and order is the subject of a writ of error, and is erroneous.

A verdict is not vitiated by the finding of superfluous matter by a jury. It is often proper and necessary that a jury should state in their verdict the grounds on which their verdict is founded.

The lien on land which a widow has for her interest, by the intestate laws, is not divested by a sheriff's sale of that land, upon a judgment whose lien was subsequently obtained.

WRIT of error to the special court of *Dauphin* county.

This was a case of appropriation of money, made upon a judgment and execution, at the suit of *Jane Kean*, administratrix with the will annexed of *John Kean*, Esq., against *George Fisher*, in which the following facts gave rise to the questions discussed and determined.

John Hamilton died in 1793 or 1794, possessed of considerable real estate in Dauphin county, leaving six children, of whom the plaintiff was one. She intermarried with *John Kean*, Esq. On a petition to the orphan's court, an inquest was awarded to divide his lands among his children. As it consisted of several tracts of land and houses, the inquest found it would bear division into several parts, and appraised each part. The sons having declined to take at the appraisement, *John Kean*, in right of his wife, appeared, and accepted, among other parts, a tract of land near Harrisburgh, which was decreed to him by the orphan's court, on his paying their respective portions to the other heirs of *John Hamilton*, Esq., and a widow, who intermarried with a Mr *Mitchel*, and is again a widow, and is yet living. After the trust in question had been allotted to *John Kean*, he, by articles of agreement, dated in the year 1804, contracted to sell the land to *George Fisher*, and was to make a title, clear of incumbrances, in the spring of 1805: 1800 dollars of the purchase money was paid; and in 1806 all the heirs released to *John Kean;* but the widow did not; and the valuation of her third portion was 1401 dollars and 67 cents. The deed was at length executed, and a dispute arose about the sufficiency of it, and it and a bond of indemnity were delivered to Mr *Fisher* for examination; and though he often said he would not accept of them, and actually returned the bond of indemnity to one of the sureties in it, yet he never returned the deed; and many years afterwards showed it to a gentle-

man to whom he mortgaged certain lands, and who, without consulting Mr *Fisher*, put it on record. Mr *Fisher* entered into possession in 1805; and *John Kean*, never having got any bonds from Mr *Fisher*, sued him on the articles of agreement. *John Kean* became insolvent, and assigned to certain persons, in trust to pay his debts; he made a will, the executors renounced, and his widow administered with the will annexed, revived the suit against Mr *Fisher*, and gave notice, by a paper filed, that she claimed the debt and sum demanded in this writ, for the use of the legatees and creditors of *John Kean* deceased.

On the trial, the jury found a verdict, which is recorded as follows: "We, the jurors in the present case, do find the sum of 1875 dollars and 60 cents due unto the plaintiff, at the institution of the suit, including interest, to this day, after deducting 1401 dollars and 67 cents, principal of a sum, and interest on the same sum from the 1st of April 1813 to this present time. The said sum of 1401 dollars and 67 cents, to remain in the hands of defendant, *George Fisher*, Esq., during the natural life of the late *John Hamilton's* widow; and at her death, or upon her release, to be paid over to the plaintiff; the payment of which to be secured by remaining a lien on the land."

On this verdict, according to the practice, judgment was entered by entering the word "judgment;" which enables the party to draw out at length the proper and legal judgment, but amounts to no more than such judgment as the party has a right to.

A *fieri facias*, and subsequently a *venditioni exponas*, issued on this judgment, and a property, different from the tract above mentioned, was sold for 9750 dollars. When the money was brought into court, the court ordered it to be distributed by the following decree. "The court order the money to be paid over to the assignees of *John Kean*, under the act of 13th of March 1812, and the supplement thereto, on the terms and conditions specified in *the verdict;* the sum, according to the verdict, to be paid presently, and interest to the 18th of January 1831, the time of acknowledging the deed, 55 dollars and 31 cents; making in all 1930 dollars and 91 cents, which is to be paid over according to the above decree. The residue, to wit 1401 dollars and 67 cents, is ordered to be paid over to *J. M. Forster*, Esq., attorney for *Jacob Ridgway*, on his judgment and mortgage, and the said judgment and mortgage, so far as paid thereby, to remain a lien in favour of the assignees of *John Kean* in this suit, as a security to them *pro tanto*, they having a previous lien, and the said lien to be assigned accordingly." There were other directions as to the residue, not material in this case. *Jane Kean* and Mr *Fisher* appealed from this decree; but, on reflection, Mr *Fisher* took this writ of error; conceiving this last decree to be an alteration of the judgment on the verdict, not warranted by the verdict and by the law.

Montgomery and *Norris*, for plaintiff in error.

[Fisher v. Kean.]

W. Hopkins, for defendant in error.

The opinion of the Court was delivered by

Huston, J.—All parties seem to agree that the verdict and the proper judgment on it, and the executions and sale remain undisturbed. We are of opinion, that in this case the writ of error lies; for although appeal is the appropiate remedy for mistake in the distribution of money raised by sheriff's sale, it is not the distribution of the money which is complained of. The execution is not brought up by this writ of error; but it is not the execution which the plaintiff in error wishes to reach; he complains of that part of the decree which directs *Ridgway's* mortgage and judgment to be assigned to the plaintiff, and to remain a lien on *all the estate of G. Fisher*, which considers the sum of 1401 dollars and 67 cents as found for the plaintiff, and nothing to do but issue an execution for it on the widow's death. The act of assembly had made that sum a lien on the specific tract appraised and no other. The jury and court could not remove it from that, nor could they in this case extend it beyond that. It is not due until the widow's death; and neither verdict nor judgment can be for a sum not yet due. And I apprehend the fair construction of the verdict, so far from finding it due, finds the very reverse. Let us attend to the case. The plaintiff claimed nearly 5000 dollars. The defendant, among other objections to this claim, showed that on the land sold to him there was a specific lien by positive law for the widow's third part of the sum at which that tract had been valued, amounting to 1401 dollars and 67 cents; and further, that from 1813 he had been charged with the interest on that sum, which had been paid, or if any part of it remained unpaid, it could be collected by distress or action against him. The jury then deducted this sum of 1401 dollars and 67 cents from the amount of the plaintiff's demand, as it stood in 1813, or what amounted to the same thing, and found a verdict for plaintiff for 1875 dollars and 60 cents. If the jury had stopped here, and given no explanation, it might have been contended that the last sum was all that they allowed for the whole of the plaintiff's claim; and possibly might have barred the plaintiff from ever recovering any thing further. To prevent this, they, in substance, say, We find 1875 dollars and 60 cents, and leave 1401 dollars and 67 cents not taken into our verdict, being the widow's third part, which is charged on the land by the law; and say in substance, for no other legal meaning can be put on the words, "which is to remain in the hands of *G. Fisher* during the life of the widow, &c." The direction that it should be secured by remaining a lien on the land, amounted to nothing; the law had placed it there and made it a lien beyond the control of courts and juries, until the widow died or released it. Courts will always so mould and construe a verdict as to make it legal if possible, and never put a construction otherwise, if the words will bear it. It is not only allowable, but proper, and often necessary to justice, that a

jury should, beside finding the issue, state the ground on which they decided. 1 *Peters's C. C. Rep.* 72. After finding the issue, the verdict is not vitiated by finding or stating something superfluous. 8 *Serg. & Rawle* 441. Such finding and stating what they did not take into view occurs constantly in trials; and if the jury find all the plaintiff is then entitled to, neither he nor the defendant has any cause of complaint. The only judgment, then, which could be entered on this verdict, was for 1875 dollars and 60 cents. Two judgments, on the same demand, one to be levied presently, and the other in future, and contingent, are, perhaps, not allowable; though a verdict for a sum, and stay of execution till an act be done, is, in our equitable proceedings, not unusual. The sum of 1401 dollars 67 cents, raised by the sale of the defendant's land, on which that was not a charge, went, without dispute, towards payment of a lien which bound the property sold; and it went so because the plaintiff had no claim to it.

If the tract on which 1401 dollars and 67 cents was charged, had been levied on and sold, it must have been subject to the payment of the interest of this sum, yearly, to the widow; for that is a kind of lien from which land cannot be discharged by sheriff's sale; unless where it is sold on a judgment or mortgage, prior to the widow's claim. We think there is error in that part of the decree which directs "the judgment and mortgage of *Jacob Ridgway*, as far as 1401 dollars and 67 cents, to remain a lien in favour of the assignees of *John Kean*, in this suit, as a security to them *pro tanto;* and that the said mortgage and judgment be assigned accordingly." It is true, that the report of arbitrators, prior to *Ridgway's* mortgage and judgment, gave the plaintiff in this cause a lien prior to *Ridgway's;* but it is also true that this verdict settles the amount of that lien to be 1875 dollars and 60 cents. The plaintiff, however, need not be alarmed: if *Jacob Ridgway* should proceed to sell the property on which this 1401 dollars and 67 cents is charged, he must sell subject to this lien; the purchaser must take subject to it; and must pay the interest to the widow, during her life, and at her death pay the principal to the heirs of *John Hamilton*, or their assignees; and, it seems, the plaintiffs are such assignees. They have, then, a lien for this sum prior to Mr *Ridgway's*, and better, and which must become effectual, though many years may elapse first.

We, then, order judgment on the verdict for 1875 dollars and 60 cents; and the residue of the verdict is merely explanatory of the principles on which the jury founded their verdict; and the sum of 1401 dollars and 67 cents is no otherwise affected by the verdict, than to show that it was not included in this finding, and remains as the law placed it.

Rees *against* Berryhill.

The decision of the common pleas confirming a sheriff's sale, and ordering the acknowledgement of the deed to the purchaser, is not the subject of a writ of error.

ERROR to the common pleas of *Dauphin* county.

The life estate of *Jeremiah Rees*, in a house and lot, was levied and sold upon a *fieri facias* at the suit of *John Berryhill*, assignee of *Samuel Agnew;* and upon the sheriff's offering the deed to the purchaser for acknowledgement, exceptions were taken to the sale. Upon argument, the court overruled the exceptions, and ordered the deed to be acknowledged, whereupon a writ of error was sued out.

Elder, for plaintiff in error.

Douglass and *Foster*, for defendant in error, whom the court declined to hear.

PER CURIAM.—This is an attempt to bring before this court the propriety of the acknowledgement of a sheriff's deed in the court below, which can not be done. As therefore the matter assigned is not the subject of a writ of error, we can take no notice of it.

Judgment affirmed.

Light *against* Light.

A wife may file her bill for a divorce, *à vinculo matrimonii*, under the act of 1815, or for alimony, under that of 1817, at her election.

CERTIORARI to the common pleas of *Lebanon* county.

This case originated in a petition of *Barbara Light* to be divorced *à vinculo matrimonii* entered into with her husband, *Martin Light*. The causes set out were adultery by the husband, and cruel and barbarous treatment of the petitioner, such as to force her to leave his house. The facts having been traversed, a declaration was filed; to which the respondent pleaded not guilty. The only question determined here arose out of the following points, put to the court below by the counsel for the respondent: the charge of adultery having been abandoned by the libellant.

[Light v. Light.]

1. That the only charge of which the jury have to inquire is, that *Martin Light*, by his cruel and barbarous treatment, has endangered the life of his wife *Barbara*, and offered such indignities to her person, as to render her condition intolerable and burthensome, and thereby forced her to withdraw from his house and family; and that this charge, under the act of the 13th of March 1817, is only cause for a divorce from bed and board, and for alimony; and that the last clause in the first section of the act of the 13th of March 1815, making this charge of cruelty and barbarous treatment a cause for a divorce from the bonds of matrimony, is repealed by the supplement passed the 26th of February 1817.

2. That the court is respectfully requested to charge the jury, that cruel and barbarous treatment, endangering his wife's life, or offering such indignity to her person as to render her condition intolerable, and life burthensome, and thereby forcing her to withdraw from her husband's house and family, is no longer a cause for a divorce from the bonds of matrimony.

The court answered these points in the negative; and the jury found a verdict for the libellant; upon which the court decreed a divorce and separation of the parties from the bonds of matrimony. The respondent appealed, and sued out a *certiorari* to remove the record. The answer to the respondent's points was the assignment of error.

Norris and *Wideman*, for appellants.
Fisher, for appellee.

Per Curiam.—We are satisfied that the construction put upon these two acts by Mr Justice *Duncan*, in *Smith* v. *Smith*, 3 *Serg. & Rawle* 248, is the true one; to wit that the wife may file her bill under that of 1815, for a divorce *à vinculo*, or that of 1817 for alimony, at her election.

Judgment affirmed.

Long *against* Long.

Upon an amicable partition of lands between tenants in common, or a sale founded upon such partition, by which money is payable to one of the tenants in common, an action may be maintained by him for its recovery against another tenant in common, who took or purchased the land, with notice to a terre tenant, to whom the land had been subsequently conveyed.

In such an action, the defendant, who took or purchased the land, would not be a competent witness to establish the liability of the terre tenant.

WRIT of error to the district court of the city and county of *Lancaster*. *Bradford*, president.

This was an action of debt by *Abraham Long* against *Benjamin Long*, with notice to *Conrad Zeigler* terre tenant, which arose out of the following facts.

Harman Long died seised of a large real estate, leaving a paper which purported to be his will, and about the validity of which his heirs at law disputed. This resulted in a written agreement between them all, some of them being of age, others minors who were represented by guardians, and others married daughters, with whom their husbands joined, by the provisions of which agreement a valuation and partition of the whole estate was to be made by certain persons appointed for that purpose, and the heirs were to take or refuse to take at such valuation; if any part should not be taken by any one, a sale of it was provided for. The partition and valuation was made, one of the parts all refused to take; it was sold, and purchased by *Benjamin Long* the defendant, and of the purchase money there was due and payable to *Abraham Long* the plaintiff 760 dollars. This land was afterwards sold by the sheriff as the property of *Benjamin Long*, and purchased by *Conrad Zeigler*. Notice was given at the time of sale that it was selling subject to this claim of *Abraham Long*, and it was struck down to *Conrad Zeigler* at 5410 dollars, of which he retained 800 dollars to meet this claim of *Abraham Long*, which sum was still in his hands.

The plaintiff offered to establish these facts by the testimony of several witnesses, but the court having been of opinion, that the action could not be maintained, rejected all the evidence, which was the subject of several bills of exception.

Benjamin Long himself was offered as a witness, and rejected on the same ground, and also that of incompetency. A verdict and judgment were rendered for the defendant.

Wright, for plaintiff in error.
Hopkins, contra.

[Long v. Long.]

The opinion of the Court was delivered by

KENNEDY, J.—This is an action of debt, brought by *Samuel Long*, for his own use, in the name of *Abraham Long*, against *Benjamin Long*, with notice to *Conrad Zeigler*. The bills of exception, and the errors assigned, raise two questions.

1. Whether the action can be maintained so as to entitle the plaintiff to a judgment, to be levied out of the land in the possession of *Conrad Zeigler*, which he bought at sheriff's sale as the property of *Benjamin Long*, the defendant in this action, subject to the payment of the debt herein claimed.

2. Whether *Benjamin Long*, the defendant, was a competent witness for the plaintiff, on the trial of the issue between him and *Conrad Zeigler*, the terre tenant.

From the nature of the plaintiff's claim, as set out by himself, it was certainly necessary to prove, that the debt was due, and owing to *Abraham Long* by *Benjamin Long*, under a valid and binding contract; and that it was such as created a lien upon the land for the payment of it, of which land *Zeigler* had become the terre tenant; and that he had full notice of the lien at the time he bought. We think, that the evidence set forth in the several bills of exception, which have been made the ground of the errors assigned in this case, tended to show all this, and, therefore, ought to have been received. Why the court below rejected the testimony, does not distinctly appear upon the record; but it is said, that it was because they thought that this action could not be supported for the purpose of making the land in the hands of *Zeigler* liable for the payment of the debt. If such was the opinion entertained by the court below, we think it was erroneous. Taking all for true, which the plaintiff offered to prove, there can be no doubt, but that the debt claimed, was justly owing to him by *Benjamin Long*; and that he had, according to the terms of the contract, a double security for the payment of it: first in the personal responsibility of *Benjamin Long*; and next, in a lien upon the land purchased by him. It has, however, been objected to the arrangement or agreement out of which this debt has arisen, that *Martin* and *Abraham Long*, two of the persons interested in the lands which were the subject matter of the arrangement, which was an agreement of compromise of family disputes and quarrels, and therefore much to be favoured, were minors at the time; and that, therefore, they were incapable, either by themselves or their guardians, of becoming parties to it, and so to dispose of their rights in the land. Admitting that these minors were incapable of binding themselves, or of being bound by their guardians for such purpose, still the contract, for reasons which will appear in the sequel, was not void, but at most only voidable; and the other contracting parties who were of full age were absolutely bound by it, and could only be released by the consent of all, or by those infants taking advantage of their infancy, and making it a plea against the fulfilment of the agreement upon their part, when they came of full age. But instead

of doing this, the evidence offered by the plaintiff, and rejected by the court, was, to prove, *inter alia*, that these infants, after their arrival at full age, had complied with, and performed the agreement in every respect; and that *Abraham*, who is the nominal plaintiff in this case, after he was of full age, and before the bringing of this suit, executed and tendered a release of his right and interest to and in the land, to *Zeigler* the terre tenant. This was all that was wanting to make his title to the land, which he then had and still has in possession, perfect. And if it be true, as the plaintiff further offered to prove, that *Zeigler* bought the land, expressly subject to the payment of this money, upon *Abraham's* effectually releasing his right and title to it; why should *Zeigler* not either pay the money, or suffer the land to be sold for it? Upon every principle of honour and justice, he ought to feel himself bound to do so, rather than suffer *Benjamin Long* to lose any thing on account of it.

If the right of the plaintiff to demand and recover the money claimed in this suit were to be made manifest, as the plaintiff by his proofs proposed, he most unquestionably ought to have a remedy for the recovery of it. For it is a rule of our law, that wherever it confers a right, it will afford a remedy by an action of some kind; and the right being once clearly established, it belongs to the courts to adopt a suitable remedy. 3 *Black. Com.* 123; 1 *Salk.* 21; 6 *Mad.* 54; *Per* Lord *Kenyon*, Chief Justice, 1 *East* 226; 1 *Chitty, Pl.* 83.

The action adopted by the plaintiff as a remedy here is debt; and is it not, I would ask, a suitable one? It is *money* that is claimed to be due, and sought to be recovered in this case; and *debt* is a more extensive remedy for the recovery of money than *assumpsit*, or perhaps any other form of action; for it lies to recover money due upon legal liabilities, or upon simple contracts, express or implied, whether verbal or written; and upon contracts under seal or of record; and on statutes by a party grieved, or a common informer, whenever the demand is for a sum certain, or is capable of being reduced to a certainty, &c. 1 *Chitty, Pl.* 101.

Where an annuity or rent is charged upon lands of the testator by his will, after his death an action of debt will lie in favour of the legatee to recover it, as often as it shall be in arrear and unpaid, against those who shall have succeeded to the possession of the lands, and have become the pernors of the profits thereof. *Dupa* v. *Mayo*, 1 *Saund.* 282. The liability of the pernors of the profits in this case does not arise *ex contractu*, but is cast upon them by operation of law upon their acts and conduct, in having taken possession of the land and received the profits of it, which were the fund appropriated by the testator in his will for the payment of the annuity or the rent. So a legacy consisting of a gross sum of money, given and charged by a testator upon his land lying in this state, may be recovered in an action of debt, to be brought against the terre tenant with notice to the executors. The judgment, however, to be rendered in such case would be for the amount of the legacy, to be

levied only out of the land upon which it was charged. An action of ejectment was at one time held to lie by some of our courts in this state, and resorted to occasionally, as a remedy by legatees whose legacies were charged by the testators upon the real estate. But of late, the action of debt seems to be the remedy that has been finally adopted, and that is now considered by this court as the most appropriate to promote the intention of the testator, and to secure to the legatee his right. This has been devised and adopted from necessity, in order to prevent a failure of justice.

Upon similar principles, and from a like necessity, we think, then, that if the plaintiff here shall make out by proof the facts of his case as he proposed, to the conviction of the jury, that, in law, he would be entitled to a judgment for the amount of his debt, to be levied out of the land upon which it was charged, and subject to which *Zeigler* purchased.

It was contended upon the argument of the case, that the lien which is claimed to exist upon the land in the possession of *Zeigler*, according to the evidence that was offered to be given of it, originated in, and grew out of a parol contract; that such a contract is altogether insufficient in law to create a lien upon real estate. That it would not only be contrary to the statute against frauds and perjuries, but repugnant to the whole policy of our law, which reprobates all liens upon lands or real estate which cannot be placed upon public record.

Whether a lien can in any case be created by a parol contract upon real estate or not, is a question, as I conceive, not altogether necessary to be decided here. For the agreement between the parties for the partition, valuation and disposition of the estate, was made and reduced to writing and signed by them. And again, after the agreement had been carried into execution, and the estate had all been taken and disposed of by the parties under it, it was proposed to be proved, that the whole had been ratified and confirmed by releases and instruments of writing executed by the parties respectively for that purpose. More than this, I think, could not have been required to take the case out of the statute of frauds. As it regards the object of the agreement, whether viewed as a compromise of unhappy disputes and quarrels which had arisen between members of the same family, or as the severance of interests in an estate that was held in coparcenary, it not only comports with the policy of the law to promote it, but is entitled to its greatest favour. In all cases the law most willingly lends its aid when asked for, to make partition of estates held in joint tenancy or in common, and will compel a division of the property, so that it may be held in severalty. If, however, it will not admit of a division, and the object cannot be accomplished in that way, it will cause an appraisement to be made, and will assign it to one of the parties, he paying to the others their respective and equal proportions of the valuation money. Wherever parties, then, have done amicably what the law would have com-

pelled, it will, if possible, be doubly binding upon them. It will even bind an infant; as if he make *equal* partition, pay rent that is due, or admit a copyholder upon a surrender. 3 *Burr. Rep.* 1801. Indeed, it is a general rule, that whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. *Co. Lit.* 172 *a;* 9 *Co.* 85 *b.* Hence, as the agreement between the parties, out of which the claim in this suit has grown, was made for the purpose of dividing and parting an estate which before was held by them in common, so that each of them might get and hold his interest therein in severalty; it was to do substantially nothing more than that which the law would have enforced: I have, therefore, already said it was not *void* as to the parties to it, who were infants. It has been held in this state, that a parol partition between tenants in common, made by marking a line of division on the ground, and followed by a corresponding separate possession, is good, notwithstanding the statute against frauds. *Ebert* v. *Wood,* 1 *Binn.* 216. And if, in order to equalize the partition in such case, one of the parties had agreed to pay to the other a sum certain in money, or a certain rent yearly for ever out of his part, and that it should be a charge thereon, I am inclined to believe that a lien or charge would be thereby created upon the whole of the land taken under such partition, by the party agreeing to pay. I also believe that the law would make the money or rent a lien or charge upon the land, without any express agreement between the parties to that effect. In this state, our statute regulating the descent of real estate, passes it upon the death of the party, dying seised and intestate, to his children equally, to hold it as tenants in common, and may be considered as placing them more upon the footing with coparceners in England, than any other description of tenants of real estate. Now a parol partition between coparceners is good, and a rent may be *reserved* or *granted* without deed for equality of partition *out of the land descended;* and the rent so reserved or granted is distrainable of common right. *Lit. sec.* 252, 253; *Co. Lit.* 169 *b;* 16 *Vin. Abr. tit. Partition, G. Owelty,* 224. And if the rent be granted *generally* (without saying out of what land) for owelty of partition, *pro residuo terræ,* it shall be intended out of the *purparty of her who grants it. Co. Lit.* 169 *b.* The rent in this case is not a rent seck, but a *rent charge,* and the *purparty* of her who grants it shall be chargeable with a distress for the payment of it, as often as it shall become payable, and suffered to fall in arrear. And although a *query* seems to be added by *Sergeant Hawkins* as to the validity of such parol partition since the passage of 29th *Car.,* still I apprehend if it were carried into full execution, as in the case of *Ebert* v. *Wood,* already cited, that would be sufficient to take it out of our statute against frauds, or even in England. See *Ireland* v. *Rittle et al.* 1 *Atk.* 542, where a parol partition, after a possession had been taken and holden under it, was held good and confirmed. See also 1 *Vern.* 472. Upon the same principle, I take it, a gross sum of money may be agreed to be paid in

making a parol partition by the one to the other for owelty of partition, and may be charged upon the *purparty* of the one agreeing to pay. See *Clarendon* v. *Hornby*, 1 *P. Wms* 447. And in addition, I may also observe, that our acts of assembly passed, on the subject of partition, the 11th of April 1799, and the 7th of April 1807, have, in accordance with this principle, made the valuation money where the estate will not admit of division, or the money allowed for owelty where it shall be divided into parts of unequal value, *liens* upon the *whole of that part of the estate* taken by the party who is decreed to pay the money.

As this cause must go back to the court below again for trial, it is proper to advise the plaintiff that we consider that he was premature in going on to trial of the issue with *Zeigler*, before he obtained a judgment against *Benjamin Long*, or a plea from him, upon which he could have joined issue, and have proceeded to a trial against both by the same jury. By pursuing this course, the plaintiff will have to establish the existence of his debt against the party with whom it was actually first contracted, and who may therefore be reasonably supposed more competent to defend against it if it be unjust, or has been by him in any way satisfied; but if the existence of the debt be fully proved, then it will be for *Conrad Zeigler* to show cause, if any he has, why it should not be levied out of the land of which he claims to be the terre tenant.

The next question is, was *Benjamin Long*, the defendant, a competent witness for the plaintiff? We think he was not. For although he was a party on the record to the suit, and was called to give evidence against himself, yet, if he volunteered to do so, I do not see any sound principle upon which he could be rejected for either of of those circumstances; but his testimony was offered not merely to establish his own liability to pay the debt, but to show that the land which had become the property of *Zeigler* was liable also for the payment of it. It is very obvious, then, as the plaintiff in his declaration has stated the inability of *Benjamin Long* to pay this debt, and that for that reason he wishes to have payment of it out of the land in the hands of *Zeigler*, and therefore has made him a party to this proceeding, that *Benjamin Long* ought not to be received as a witness for the plaintiff under this view of the case, because his evidence was offered to throw the payment of the debt which he owed himself, and for which he was personally responsible to the plaintiff, upon the property of *Zeigler*, to whom he was in no wise answerable, and thus relieve himself entirely from the payment of it.

The judgment of the court below is reversed, and a *venire facias de novo* awarded.

Lyon *against* Marclay.

Proof having been given that a declaration was made at a certain time and place, by a party; it is competent for the adverse party to prove, by another witness, that he was present, and did not hear it.

There must be an acknowledgement of an *existing* debt within six years, to prevent the operation of the statute of limitations.

Cases of trust, not to be reached or affected in equity by the statute of limitations, are those technical and continuing trusts, which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of courts of equity: it must be a direct trust, belonging exclusively to the jurisdiction of a court of equity, and the question must arise between the trustee and *cestui que trust.*

The court may, at any time, to prevent injustice, or for special reasons, permit a plea to be put in *nunc pro tunc;* and a plea *puis darrein continuance*, although a continuance has intervened.

A plea *puis darrein continuance* waives all former pleas.

In an action on the case for money had and received, a release, executed after suit brought, may be given in evidence upon the general issue.

The parol gift of a debt to another, to be recovered and held in trust for an illegitimate child, may be countermanded at any time before the trust is executed. And in an action by the *cestui que trust* against the trustee, to recover the money, a release by the donor to the trustee, executed after suit brought, may be given in evidence.

FROM the district court of *Lancaster* county.

In the court below, this was an action on the case, for money had and received, by *Jacob F. Marclay* and *Ann* his wife, against *Thomas Lyon's* executor.

Elizabeth Lyon had an illegitimate child, for which *Robert Hamilton* was indicted, convicted and sentenced. He gave a bond to the mother, conditioned for the payment of that part of the money which, by the terms of the sentence, was payable to her. A suit was also brought by *Elizabeth Lyon* against *Robert Hamilton*, for a breach of promise of marriage, in which a verdict and judgment were obtained for the plaintiff of 1000 pounds damages. *Elizabeth* assigned the bond, by indorsement on the back of it, to her father, *Thomas Lyon*, the defendant's testator, in trust for the use of the child of said *Elizabeth*, whose name was *Ann*. The judgment for the 1000 pounds, *Elizabeth* directed her father to recover for the same use. Both sums were recovered by *Thomas Lyon*, and loaned to different individuals; he declaring, at the time, and also when he received it again, that it was for the use of *Ann*, the child of his daughter *Elizabeth*. This evidence was given by the plaintiffs, who were the said *Ann* and her husband, *Jacob F. Marclay;* and to each part of it the defendant objected; and the objections were overruled by the court, which formed several bills of exception.

The defendant offered to prove, by a witness, that he was present at one of the times that *Thomas Lyon* was alleged to have declared

that the money was for the use of *Ann*, and that he, the witness, did not hear any such conversation. This the plaintiff objected to, and the court overruled the evidence, and the defendant excepted.

The defendant also offered in evidence a release by *Elizabeth Lyon* to her father, *Thomas Lyon*, from the payment of the money for which this suit was brought; which she therein acknowledged she had received. This paper was dated after suit brought, and was objected to on that ground, and also that *Elizabeth Lyon* could not release a debt due to her daughter *Ann*. It was rejected, which was the subject of another bill of exceptions.

The defendant also contended that the statute of limitations was a bar to the plaintiff's recovery; the answer to which was, that it was such a case of trust that the statute was not applicable; and of this opinion was the court.

The opinions of the court, as contained in the several bills of exception, were assigned for errors.

W. Hopkins and *J. Hopkins*, for plaintiff in error.

The money for which the suit is brought belonged to the mother, and the proof of the appropriation of it by her amounts to nothing more than a declaration of her intention to give it to her child; an intention perfectly within her power, at all times, to change. It was a mere promise to give, wanting the essential quality of a delivery of possession, and, therefore, not binding. 2 *Kent's Comm.* 354. A parol promise to pay money as a gift, will not sustain an action. 7 *Johns. Rep.* 26; 2 *Desaussure* 79; 2 *Johns. Rep.* 52; and in 18 *Johns. Rep.* 145, it was held, that a note from a father to a son, at sixty days, without consideration, was not recoverable from the father's executors.

A gift of this kind is always revocable. 1 *Johns. Rep.* 55. And if it be so, it was important for us to show that it had been revoked. The plaintiffs having given in evidence the declarations of *Lyon*, to prove a gift; it was competent for us to give in evidence other declarations that there was no gift. The intention can only be shown by declarations. 1 *Phil. Ev.* 355. The plaintiffs claimed through *Lyon*, and, therefore, his declarations were evidence. 2 *Serg. & Rawle* 354; 1 *Dall.* 65. The sum of the plaintiff's evidence was the declarations or acknowledgements of the defendant's testator, that his daughter *Elizabeth* had made the gift: this would not bind her; and the court refused admission to evidence of her determination that there should be no such gift; her release was perfectly competent, and should have been received.

Montgomery and *Ellmaker*, for defendant in error.

It has not been pretended but that *choses in action*, or evidence of indebtedness, are the subjects of gift and transfer; and that such a gift or transfer, in consideration of natural love and affection, would be available. What, then, is this case? The mother, entitled to a

chose in action, declares her intention to give it to her minor daughter; actually appoints a trustee to receive the gift for her, and delivers the possession, as far as the thing was susceptible of delivery; permits him to proceed to the collection of the money, and to its investment; and although this trustee continually declares the object of the trust, the mother never once denies it, until the *cestui que trust* seeks, by an action, for that which is hers; and then, for the first time, the donor releases the trustee, for the purpose of defeating the *cestui que trust*—inveigling her into a suit, to cut her off in the midst of it. The release was executed after suit brought, which is an answer to its alleged competency.

The opinion of the Court was delivered by

Ross, J.—The declaration in this case contained two counts, one for work and labour done and performed by the said Anne, and the other for money had and received for her use while sole. The defendant pleaded non assumpsit, and the statute of limitations, to which the plaintiff replied an assumption within six years. It seems that Anne, the wife of the plaintiff below, was an illegitimate child of *Elizabeth Lyon*, daughter of the deceased *T. Lyon*. She was born on the 29th of May 1799. *Robert Hamilton* was her putative father. He was indicted for the offence at August sessions 1799, and submitting to the court, was sentenced to pay a fine of twenty dollars for lying-in expenses, and ten shillings per week for seven years, from the 29th of May 1799, to *Elizabeth*, the mother, for the support of her child *Anne*. He gave a bond to *Elizabeth* in pursuance of the sentence, which bond she afterwards, to wit 20th of March 1802, assigned to her father, *T. Lyon*, in trust for the use of the child. Judgment had been entered on this bond before the assignment some time in October 1799; and a *fieri facias* had issued under which two hundred and fifty acres of land had been levied on, an inquisition held, but no condemnation made.

T. Lyon also brought a suit against *Robert Hamilton*, for seducing and debauching his daughter *Elizabeth*, and on the 26th of April 1800 obtained a verdict and judgment for 100 pounds. To August term 1799, *Elizabeth* brought a suit against him for a breach of promise of marriage, and obtained a judgment for 1000 pounds, and on the 24th of August 1801, she entered satisfaction on this judgment. One-half of the 100 pounds and one half of the 1000 pounds was retained by *James Hopkins*, Esquire, for his fees and services in conducting the suits; so that the amount actually received by *T. Lyon* on his judgment was 50 pounds; and the sum received by *Elizabeth* on her judgment 500 pounds. *Anne* married the plaintiff on the 27th of April 1824, being at that time about twenty-five years of age. She was raised and supported by her maternal grandfather, *T. Lyon*, and continued to live with him until she married the plaintiff. During all this time she was treated in the same manner as were the daughters of her respectable neighbours; and when old

enough, she worked as other daughters of reputable and substantial farmers are in the habit of doing. From this statement it appears that she lived with her grandfather about seven years after she had attained the age of eighteen. A mass of parol testimony was given, in order to prove that *T. Lyon* held the different sums of money received on the judgments against *Robert Hamilton* in trust for *Anne*. That part of the evidence, which seemed to have much relation to the question trying, were his declarations made when he was offering to loan 600 pounds, or when he was receiving part of the moneys loaned, or endeavouring to secure the same. Thus it was proved, he said, "that he allowed the money to go to his daughter *Betsey's* child;" and that he directed the loan to be made payable in gold or silver, and assigned as a reason for being more particular about it than about other money, that "it was the money he allowed for *Anne*—money for the little girl;" again, it was proved, that he had declared that the 600 pounds should go, and *ought to go to Betsey's* child, though he did not say from whom the money had been received. Many expressions similar to these were proved to have been made by *T. Lyon*. Much of the evidence given with those declarations was totally irrelevant, and ought not to have been admitted; or if it were unavoidably received in hearing that which was really applicable to the case, the jury should have been instructed by the court that it was not evidence, and directed to pay no regard to it. Although in questions of secret trusts, or such as the trustee endeavours to avoid, a great latitude is allowed in the admission of testimony, and almost every species of acknowledgement, consistent with the principles of the law of evidence, may be admitted, in order to ferret out the truth, yet some testimony may be so vague, uncertain, and entirely foreign to the inquiry making, as to be calculated to deceive and mislead any mind, but particularly such as have not been well versed in the philosophy of evidence. Courts should never suffer evidence to be given to a jury, which would only tend to bury that which was calculated to elucidate the case under a mass of rubbish totally inapplicable to the points in issue. Even to the most experienced in the investigation of facts, it becomes excessively irksome and laborious, under such circumstances, to sift the wheat from the chaff, and determine as to what may or may not establish the fact proposed to be proved. These general observations will be found to apply to a great part of the evidence, which has been excepted to in this case. The questions were, whether *Thomas Lyon* was a trustee for *Ann*, and whether he held any money in trust for her at any time? If he did: what money was it—how much—and from whom had he received it? A great portion of the evidence, therefore, respecting the declaration of *T. Lyon* as to his loaning money, his fears of losing it, his getting it secured, his receiving it afterwards and entering satisfaction on mortgages given to secure the same, could not aid in the solution of these questions, particularly unaccompanied as they were with any thing done or

said by him, from which it might be inferred, that he held the same in trust for *Ann.*

I am unable to discover any legal ground for the rejection of the testimony of *N. Lightner.* He was offered to prove, that he had been present at the time that *T. Lyon* was represented to have said it was *Ann's* money; and also, that he was present when the bond and note were paid off, and that there was nothing said by *T. Lyon*, as to any part of the money belonging to *Ann.* It is a well known rule of evidence, that one affirmative witness, if credited, will outweigh several negative witnesses; because one man may see and hear many things, which another person present may not have seen or heard. The very existence, however, of the rule shows incontrovertibly, that negative testimony is legal, and therefore the court erred in rejecting the evidence of *N. Lightner.*

But was the statute of limitations, which was pleaded in this action, a bar to the plaintiff's recovery? I think it was, unless the plaintiff proved an assumption within six years; and *perhaps* the court would have been justified in excluding most of the plaintiff's evidence as to proof of acknowledgements made by the defendant, more than six years before the suit was brought. In order to prevent the statute being a bar, there must be an acknowledgement of an *existing* debt within six years. 2 *Penns. Rep.* 305, 306, and authors cited. It has not been contended, that the law is not so settled; but it is urged, that trusts stand on a different footing, and are exempt from the general rule of the law, and without the operation of the statute. "The sound rule," says Chancellor *Kent*, "established on the solid foundations of authority and policy, is, that the cases of trusts not to be reached or affected in equity by the statute of limitations, are those technical and continuing trusts, which are not at all cognisable at law, but fall within the proper, peculiar and exclusive jurisdiction of chancery." See 7 *Johns. Chan. Rep.* 100 *et seq.*, where the whole subject is examined, and see also the learned note of *Laussat* to *Fonblanque's Equity* 262, 263. But a person who receives money to be paid to another, or to be applied to a particular purpose, and does not pay it to the person, or apply it to the purpose intended, is a trustee and suable either in law or equity. Yet such cases are not without the operation of the statute of limitations under the *notion of a trust*, although they are cases of express and direct trusts. To exempt a trust from the bar of the statute, it must be, first, a direct trust; secondly, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and thirdly, the question must arise between the trustee and *cestui que trust.* Hence it has been decided, that the statute of limitations is a good plea to a suit in equity, brought to recover money collected by an attorney for the plaintiff, and not accounted for by him. *Kinney's Executors* v. *M'Clure*, 1 *Rand.* 284. So in *Johnson* v. *Humphreys*, 14 *Serg. & Rawle* 394, it was decided, that when a trustee holds adversely to his *cestui que trust*, the statute

begins to run. I am satisfied from an examination of the authorities, that there is nothing in the present case which can exempt it from the operation of the statute of limitations; and, therefore, the court erred in charging the jury, that the statute did not apply; and they equally erred in leaving the law and the facts to the determination of the jury; for there was nothing proved, according to the evidence returned to this court, from which an express or implied assumption could be inferred.

Was the release of *Elizabeth* to *Thomas Lyon* properly rejected? It is contended, that it was not evidence, because it appeared on its face to have been given after the suit was instituted. The suit was commenced in April 1826, and the release was given in September 1826. It was also argued, that it should have been pleaded *puis darrein continuance*, to have justified the court in the admission of it in evidence. It is true, that such is the general rule; but the court may at any time, to prevent injustice, or for special reasons, permit a plea to be put in *nunc pro tunc*, although a continuance has intervened. 4 *Serg. & Rawle* 238, and see 10 *Johns. Rep.* 161. I apprehend, that whenever the pleas already entered are sufficient to entitle the party to the admission of the evidence, in case it existed before the bringing of the suit, it may be given in evidence without any additional plea, or a repetition of the same plea *puis darrein continuance*. There is great hazard in a plea of *puis darrein continuance*, because it waives all former pleas. It can only be safely entered, where it is a sufficient bar to the plaintiff's recovery. In the case under consideration, could the defendant have safely abandoned the pleas of *non assumpsit*, and the statute of limitations? For this must have been the effect, if the release had been pleaded *puis darrein continuance*. In 4 *Serg. & Rawle* 239, the present chief justice, in delivering the opinion of the court, said, "it is very certain, a plea *puis darrein continuance* waives all former pleas; that the defendant must stand or fall by it; and if put in issue, it forms the only subject of inquiry before the jury." With this agrees *Buller's N. P.* 209. The question is therefore reduced to the inquiry, whether a release, obtained after suit brought, can be given in evidence on the plea of *non assumpsit*. No one will doubt that money had and received in payment after action brought, but before trial, may be given in evidence under the general issue of *non assumpsit* in an action on the case, or that the record of a recovery from another person equally liable with the defendant to the payment of the same sum for which the action is brought, may not also be given in evidence under the general issue. A person, who has once recovered a full and complete satisfaction from one man, cannot again recover from another, for the same thing. The cases of indorsed notes, or of trespasses committed by several persons, are illustrations of this principle. In the case of *Bird* v. *Randall*, 3 *Burr.* 1353, which was an action on the case for inducing a journeyman to leave the service of the plaintiff, Lord *Mansfield* says, "an action upon the case is founded upon

the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore, such a former recovery, release or satisfaction need not be pleaded, but may be *given in evidence.* For whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may in this action be given in evidence by the defendant; because the plaintiff must recover upon the *justice and conscience of his case*, and upon *that only.*" From an attentive consideration of the principles contained in this case of *Bird* v. *Randall*, it seems, that satisfaction or releases given after suit brought, but before trial, may be given in evidence in this action, under the general issue. And with this opinion accords the case of *Bailey et al.* v. *Fettyplace*, 7 *Mass.* 325. *Sedgwick*, Justice, says, whenever full satisfaction has been received by the plaintiff, *before the trial*, it is as effectual a bar to his recovery, as if he had been paid before the commencement of the action. He cites the case of *Bird* v. *Randall*, and adds, that a full satisfaction, after the commencement of the action, and *before the trial*, need not be pleaded, but may be given in evidence under the general issue. I am clearly of opinion, from these authorities, as well as from the reason and justice of the law, that the release was improperly rejected, and that the court erred in not admitting it.

The last point, which it is material to notice is, whether an executory gift, unaccompanied with any delivery of possession, is a *nudum pactum*, and therefore neither binding, nor to be enforced in law or equity. It has been contended, that a gift is not consummate until delivery of possession of the thing promised. In the case of *Fink* v. *Cox*, 18 *Johns. Rep.* 145, it has been decided, that a promissory note for 1000 dollars, given merely from affection, by a father to his son, and payable sixty days after date, was not a valid gift of so much *money*, but a mere promise to give, and that *blood* or *natural affection* was not a sufficient consideration to support a simple executory contract. The counsel for the plaintiff in error also referred to *Kent's Com.* 354; *Pearson* v. *Pearson*, 7 *Johns. Rep.* 26; *Noble* v. *Smith*, 2 *Johns. Rep.* 52. I content myself, by merely referring to the cases on this point, cited by the counsel, which seem to support the position contended for; because, Mr *Ellmaker*, on the part of the defendant in error, with his usual candour, distinctly said, "we do not differ about the law of gifts, but the application of it to this case." He contended, that *Thomas Lyon* was the natural guardian of *Ann*, and that therefore the gift was as fully consummated by delivery, (the fund or thing being in his hands) as in the nature of things it could be. This reasoning, I think, is more ingenious than sound. As I understand the law, the natural guardian has no power to receive the minor's money; nor can he release any claims the minor may have. If *T. Lyon* did receive any money for her, no doubt he would be considered as holding it in trust. It strikes me, that the most important question is one of fact, and that is, whether *Elizabeth*, the mother, paid into the hands of her father 500 pounds for

her daughter *Ann*. And if this fact should be established in the affirmative, then, whether the law would permit her to revoke or alter the original direction of the use to which it had been applied.

I am inclined to think, that money deposited in the hands of the father by the daughter, to be paid to *Ann*, without any consideration having been received, and with no other claims upon it, than the mere benevolence of *Elizabeth*, would be only a *gift*, subject to the same rules of law which govern other gifts. *Elizabeth* might countermand the order to pay to *Ann*, and direct it to be paid to herself, if no other person had derived any claim to it before such countermand. And *Ann*, thus situated, could not enforce the payment thereof. 2 *Dessaus*. 79. This I consider correct, as a general principle; but circumstances may exist, arising out of the particular transaction of the case, which would essentially vary the rule.

I have expressed my opinion upon the points adverted to in the argument; from which it appears the court erred in the particular instances referred to.

Judgment reversed, and a *venire facias de novo* awarded.

Fisher *against* Kean.

To receive counter evidence of facts, adduced to make way for the rejection of other evidence, and thus draw the decision of the cause from the jury to the court, is error.

ERROR to the special court of common pleas of *Dauphin* county.

Ejectment by *Jane Kean* against *George Fisher*.

Upon the trial of this cause, the defendant offered in evidence a deed from the plaintiff to him for the land in dispute. The defendant's counsel objected to its admission, on the ground that it had never been delivered; and gave evidence to the court to establish that fact; upon which evidence the deed was rejected.

M'Cormick, for plaintiff in error.

If the deed offered in evidence were a perfect one, having the properties of execution and delivery, its effect would have been to determine every thing in the cause. Whether it possessed those essential qualities was a substantive matter of fact; which alone the jury were competent to decide. As well might the court assume the power to determine, upon the plea of *non est factum*, whether the signature was a forgery or not, and, determining it affirmatively, reject the deed. He cited 6 *Serg. & Rawle* 310; 1 *Serg. & Rawle* 72;

10 *Serg. & Rawle* 170; 1 *Binn.* 442; 6 *Serg. & Rawle* 15; 1 *Harris & John.* 323; 9 *Serg. & Rawle* 68, 82.

Elder, contra.

The paper was offered in evidence as a deed; the court were abundantly satisfied that it wanted the essential quality of a deed, and therefore rightly rejected it.

Per Curiam.—We have more than once spoken in terms of censure of a practice too common in the trial of causes, of receiving counter evidence of facts, adduced to make way for the rejection of other evidence, and thus drawing the decision, perhaps of the whole cause, from the jury to the court. There are several decisions to this effect, of which *Crotzer* v. *Russel*, 9 *Serg. & Rawle* 68, is an instance; notwithstanding which, we are sorry to see the practice persevered in. Our course, in all instances of it, is a plain one. Here *prima facie* evidence had been given of the execution of a conveyance, which, if found to be the deed of the plaintiff, made an end of the controversy; yet, this was successfully rebutted before the court, and not the jury, who were the constitutional judges of the fact on which the cause turned. On the very evidence submitted, a jury might have found in favour of the defendant. But the degree of the proof is immaterial, if it makes out a *prima facie* case of competency. Here a deed, apparently well executed on the face of it, acknowledged, recorded and produced by the grantee, was rejected on the faith of proof introduced to rebut the delivery; and this we are compelled to say was gross error.

Judgment reversed, and a *venire de novo* awarded.

Geddis *against* Hawk.

A creditor is not bound to resort to the principal for the collection of his debt, in the first instance; nor is he bound to resort first to a lien which secures his debt, but he may sue and recover from a surety.

What a surety may and may not avail himself of as an equitable defence.

WRIT of error to the common pleas of *Lebanon* county.

This was an action of debt by *Robert Geddis* and *Samuel Carper* surviving *John Wolfersberger*, against *Jonas Hawk* surviving executor of *Michael Hawk* who was a joint and several obligor with *Adam Hawk*.

The plaintiff gave in evidence two bonds, dated the 3d April 1810, given by *Adam Hawk* and *Michael Hawk* to *Robert Geddis*, *Samuel Carper* and *John Wolfersberger*, conditioned for the payment of 471 pounds 1 shilling and 4 pence, on the 1st April 1814, and the 1st April 1815.

The defendant then gave in evidence the record of the proceedings of the orphan's court of Dauphin county, for the sale of the real estate of *John Carper* deceased, purchased by *Adam Hawk*, for which he gave the said two bonds with *Michael Hawk* as his security; and offered to prove "that the plaintiffs in the above suit, the administrators of *John Carper* deceased, have not and do not resort to the aforesaid lands so sold for the recovery of the money due on said two bonds, or take such legal means as they in law and equity should do to make the said money, from said lands, so sold as aforesaid: That *Adam Hawk* and wife sold and conveyed one hundred and fifteen acres and one hundred and one perches of the land to *Peter Witmer*, in the spring of 1817, and received a large sum of money, say about 8000 dollars in hand, and took bonds for the residue; and also sold the residue of said lands to *Philip Gruber;* and all this with the knowledge, and under the very eyes of the plaintiffs in this cause, who made no request of payment thereout, nor did they make any objections to the sale or transfer of title to said land; that *Michael Hawk*, the surety in said bonds, died, having first made his last will in writing, and therein appointed *Jonas Hawk* and others executors thereof; that probate was had of said will at Lebanon, in the county of Lebanon; that these executors gave due and public notice to all the creditors of *Michael Hawk* deceased, to bring forward and exhibit their claims and demands according to the provisions of the act of the general assembly, entitled an act directing the descent of intestates' real estates and distribution of their personal estates, and for other purposes therein mentioned, passed the 19th day of April 1794; and that these plaintiffs, residing in the same neighbourhood,

[Geddis v. Hawk.]

never made any exhibit of these bonds now in suit, or demand of their amount, of or from the executors of said *Michael Hawk* deceased, but suffered the said executors to settle off his estate and pay the same over to the legatees without claim, demand or objection; that the said *Peter Witmer* placed his son *John Witmer* in the possession, use and enjoyment of the said lands so by him purchased of *Adam Hawk*, in the year 1817, who resides thereon ever since. That *Robert Geddis* was the most active administrator of *John Carper* deceased, and did the principal part of the business in settling his estate, and made and signed a notice in writing, which he sent to *John Witmer* in the year 1819, stating as follows:

"Sir, Please to take notice, that two bonds remain in my hands unpaid, given by *Adam Hawk* and *Michael Hawk*, unto *Robert Geddis*, *Samuel Carper*, *John Wolfersberger*, administrators of *John Carper* deceased, of Londonderry township, in the county of Dauphin, now Lebanon; the one dated the 3d of April 1810, conditioned to pay the sum of 470 pounds on the 1st of April 1815, and the other thereof is dated the 3d of April 1810, conditioned to pay the sum of 470 pounds on the 1st of April 1814, which said bonds were given by *Adam* and *Michael Hawk* as part of the purchase money of a certain plantation and tract of land, situate in Londonderry township, now a part in Lebanon and a part in Dauphin county, which you purchased from the said *Adam Hawk* some time in the year 1816 or 1817; you will therefore please to take notice, and not pay any more money on account of the said purchase, as I will look to the lands for the payment of the two bonds."

"That having received the above notice, *Peter Witmer* has retained in his hands near 4000 dollars of the purchase money which he was to pay *Adam Hawk* for said land, and it is lying useless and dead ever since, all which evidence was objected to by the plaintiff, and the court overruled the objection and admitted the evidence. To which opinion of the court the counsel for the plaintiff did except."

The defendants then further gave in evidence the discharge of *Adam Hawk* as an insolvent debtor, of 5th of August, and 7th of November 1822. When the plaintiffs, to maintain the issue on their part, gave the following evidence: the will of *Michael Hawk*, dated 14th of September 1813, and probate thereof; and then called *John Gloninger*, Esq., who being sworn, did say, I drew the deed from the administrators to *Adam Hawk*, in March 1817: I do not believe that any money was paid by *Adam Hawk* at the time of its execution at my house. It is usual to give such a receipt as this on the deed, when bonds are given for the gales: I saw no bonds there. I drew the agreement between *Adam Hawk* and *Peter Witmer*, and discovered then the defect in the deed written by *Hollingsworth*, from the administrators of *Carper* to *Adam Hawk*, and I informed the parties that the deed was defective. That it contained no grant, &c., and they and Mr *Wright*, the counsel for *Adam Hawk*, agreed that I should draw another deed from the administrators to *Adam Hawk*.

[Geddis v. Hawk.]

I did so; and the administrators came and executed the deed willingly without making any objections. Some money was paid by *Peter Witmer* to *Adam Hawk*, on the 3d of April 1817, when the deed was executed; but how much I cannot remember. *Michael Hawk*, I think, lived with *Adam Hawk* when I drew his will in 1813, but I am not sure. I cannot say particularly the very words used by *Michael*, when he gave me instructions to draw his will, but the substance was, that *Adam Hawk*, his son, had received his share of his father's estate, either in the place at Camblestown, or in the money paid for it, I cannot remember which; I had asked him the reason he omitted to name *Adam* in his will. I drew the recitals in the deed from the deed of *Hollingsworth's* drawing. The receipt would imply that some money was paid at the time of executing it, but I cannot remember that I saw any money paid; there might have been money paid without my recollecting it. There was nothing said about the purchase money being unpaid. It was intended that *Peter Witmer* should have a full and clear title. The administrators were not present at any time. The object of the new deed was merely to cure the defect in the first one; not to warrant or guaranty any title. There was nothing said to the administrators about *Peter Witmer;* I stated to them nothing about him or his title, but merely the defect in the first deed, which contained no conveyance. The bond of indemnity was executed at the same time that the deed from *Adam Hawk* to *Peter Witmer* was executed; the bond was given to indemnify *Witmer* against all claims whatsoever. I do not remember —— particularly, or that any thing was said about the incumbrance of the lien of the purchase money; it was to secure to *Witmer* a full and clear title. The plaintiff then offered the bond of indemnity, and gave it in evidence, dated 3d of April 1817, from *Adam Hawk*, *Martin Thomas* and *John Wolfserberger*, to *Peter Witmer*, for the sum of 5215 pounds, to indemnify *Peter Witmer* against all claims and incumbrances on the land he purchased from *Adam Hawk*, prout the bond: and further, the plaintiff gave in evidence a full exemplification of the record of the proceedings in the orphan's court of Dauphin county, for the sale of the land of *John Carper* deceased, to *Adam Hawk*. It was then admitted by the parties, that about 4000 dollars were retained by *Peter Witmer* after *Robert Geddis's* notice to him, say two bonds, 738 pounds 2 shillings and 6 pence, each payable in 1819 and 1820. The plaintiff further gave in evidence the record of the suits Nos. 15 and 16, to November term 1818, by the administrators of *Carper* against *Adam Hawk*, on the bonds in this suit and judgment thereon; and here the defendants, to show that the bond of indemnity was only intended to embrace judgments and mortgages against *Adam Hawk*, and not the lien for the purchase money, offered in evidence the records of certain judgments, &c. against *Adam Hawk*.

Here Mr *Norris*, for the plaintiffs, offered and tendered to the defendant, an assignment of the rights of the plaintiffs to proceed against

the fund fixed by the sale in the orphan's court, dated 7th of August 1829. The defendant then gave in evidence the record of two suits Nos. 23 and 24, to November Term 1821 : a *scire facias* and an ejectment, and *non pros.* of writ of error. And here the testimony closed and the counsel for the plaintiff submitted to the court the following points.

1. That the bonds in suit are joint and several, and that *Robert Geddis* and *Samuel Carper* have in law a perfect right to sue *Michael* or *Adam Hawk*, or their representatives, for the money, and that the suit may be commenced against both or either at the election of *Geddis* and *Carper*.

2. That *Michael Hawk* having signed, and sealed and delivered these bonds as his act and deed, is bound in law to pay the money on the day fixed, and if he seek to be relieved from the penalty of the bonds, he must show and prove actual payment, or that in equity and good conscience it ought not to be paid.

3. That as there is no evidence of the actual payment of the money, or pretence of payment set up by the defendant, his defence entirely rests upon circumstances, and the equity they pretend to establish.

4. That if from the evidence of *Frederick Wolfersberger*, *John Gloninger* and the will of *Michael Hawk*, together with the relation of the parties, the jury believe that *Michael Hawk* signed and sealed these bonds given for the half of the purchase money of the lands bought by *Adam Hawk* from the administrators, with the view, and for the purpose of advancing his son *Adam*, and of making these bonds his son *Adam's* share of his estate, then in that case *Michael Hawk* was not the surety but the principal in the bonds.

5. That *Adam Hawk* is not named in his father's will: and as there is not a word of testimony or proof in the cause that *Adam* ever received any thing from his father on account of his share in the estate, and as there is the clear and full proof of *John Gloninger*, who drew the will, that *Michael Hawk*, when he gave directions for making his will, gave as a reason for excluding *Adam*, that *Adam* had his share in the Campbell's town land, or when it was bought he had his share—There is, from all these facts and circumstances, manifest proof that *Michael Hawk* was not, or cannot be considered in the light of a surety.

6. That if *Michael Hawk* was but a surety in these bonds, he is not discharged, because neither he nor his executor ever called upon *R. Geddis*, or *Carper*, or *Wolfersberger*, requesting them to sue *Adam*, or telling them if they did not sue *Adam Hawk*, he, *Michael Hawk*, or his executors, or his estate would be considered as discharged: that nothing but a positive request made by the surety upon the creditors, and this request clear and fully proved, can discharge a surety.

7. That the proceedings in the orphan's court of Dauphin county give a good and perfect title to *Adam Hawk* for the land he bought;

and the deed by the administrators, made in pursuance of the orders of the orphan's court, is but the evidence of the record of the sale and confirmation, and this deed does not, nor could not, without the actual payment of the purchase money, discharge the land of the lien and charge of the purchase money fixed by the statute of 2d April 1804.

8. That *Peter Witmer* was a purchaser from *A. Hawk* with full notice of the balance of *Hawk's* purchase money remaining a lien upon the land; that he had notice of the act of 1804 and of all the proceedings had in the orphan's court recited in his deed; that having this full notice he takes a bond of indemnity from *Thomas* and *Wolfersberger* to secure him against all peril and loss, and that in the language of the supreme court in this cause, "in every view, he, *Peter Witmer*, stands in the situation of *Adam Hawk*, and has no peculiar equity."

9. That the evidence of the notice served in 1829 by the administrators of *Carper* upon *Peter Witmer*, not to pay over to *Adam Hawk* the balance of his purchase money, and the call in the newspapers of February 1817, by the executors of *M. Hawk*, for the creditors to present their demands, are not, in equity, circumstances that can discharge the estate of *Michael Hawk* from the payment of the money, and that such is the law laid down by the supreme court in this cause.

10. That by the circumstances given in evidence on this trial, the plaintiffs are entitled and have a right, in law and justice, to a verdict at all events, upon the condition of assigning to the administrator of *Michael Hawk*, all their right and remedies to the lands, and the lien and charge remaining upon them, and waiting with the execution in this suit, until the defendant proceed at his own cost against the land, and exhaust it.

11. That from the evidence given upon this trial, and from the tender now made by *Robert Geddis* and *Samuel Carper* of the assignment by their deed of all their right and their remedies to the administrator of *M. Hawk*, to substitute him in their place and clothe him with all their securities relating to the real fund, and from their offer to file this deed of assignment under the direction of the court of record in this cause, upon their obtaining a verdict, either conditional or absolute—From all this evidence and from this tender, the plaintiffs *Geddis* and *Carper* are entitled to an absolute verdict.

And the defendants submitted the following points.

1. If the jury believe the evidence given on this trial, viz.—Proceedings of orphan's court to sale of the lands; bonds in suit taken for part of the purchase money on such sale, and *Michael Hawk* surety in the bonds, plaintiffs giving the deed to *Adam Hawk*, 24th March 1817, the death of *Michael Hawk* in 1815. Notice to creditors on the 15th of February 1817, by the executors to *Michael Hawk*, and no demand ever made of them by plaintiffs this suit brought. Notice by *Robert Geddis* to *Witmer*, who bought of *Adam Hawk*, with

the knowledge not to pay *A. Hawk* the money due for the land, but that the plaintiffs would look to the land for the payment of these bonds, and *Witmer* keeping back the money, will not these acts of plaintiff discharge the surety *Michael Hawk*, and his estate, from the payment of the bonds?

2. That if the jury believe, that plaintiffs knew that *Adam Hawk* had sold to *Peter Witmer*, by articles of agreement; that when the deeds and title papers were brought to Judge *Gloninger* to draw a deed from *Adam Hawk* to *Witmer*, that the judge discovered the omissions and imperfections in the deed, 6th April 1811, by the said administrators to *Adam Hawk*; that the said administrators were told of these imperfections, and requested to execute a new deed, and knew that *Witmer* had bought the lands from *Adam Hawk*; that they executed the deed of the 24th of March 1817, without saying a word about the bonds on which this suit is brought remaining yet unpaid, and this being after the death of *Michael Hawk*, the surety; that they executed the last deed without making any exertion, or in any manner whatsoever attempting to have these bonds paid out of the hand money, to be paid by *Witmer* to *Hawk*, all these bonds being then due: that these facts, if found by the jury, would discharge *Michael Hawk* as the bail or surety in these bonds from the payment of the bonds.

3. That the two suits to November term 1818, No. 15 and 16, and *fieri facias* and levy, are a discharge of the debt, and show the debt satisfied; that this suit is a bar to any other suit; that the plaintiffs, having omitted to notify and bring in the terre tenants upon the record, so as to make the lands liable for the purchase money, *Carper's* administrators have put it out of the power of *Michael Hawk's* representatives ever to resort to the lands by any action, either in law or equity, and therefore plaintiffs in this suit ought not to recover.

The court, upon the points submitted by the plaintiffs, charged the jury as follows. That the first, second and third points, as stated, were the law. That the fourth point was the law, but that evidence had been given to show that *Michael Hawk* was the surety in the bonds; and whether he was surety or principal, was a matter of fact for the jury to decide. That the sixth and seventh points are the law. To the eighth point the court charged, that *Peter Witmer* was a purchaser from *Adam Hawk*. The proceedings in the orphan's court recited in his deed, are notice to him that by the act of the 2d of April 1804, the balance of the purchase money, if any remained due by *Adam Hawk*, was a lien on the land, and with this notice he takes a bond of indemnity from *A. Hawk*, *Thomas* and *Wolfersberger* to secure him against all claims on the land. Therefore *Peter Witmer* stands in the situation of *Adam Hawk*, and has no peculiar equity. That the ninth and tenth points are the law. On the eleventh point the court charge the jury: that from all the evidence as stated on this point, together with the tender of plaintiffs' deed

to the administrator of *Michael Hawk*, the plaintiffs were not entitled to an absolute verdict, if the jury should be of opinion from the evidence in the cause, that *Michael* was only the surety in the bonds. But if the jury should be of opinion that he was a principal in the bonds, and not the surety, then, unless they are satisfied that he has by payment or otherwise been discharged from liability on the bonds, they ought to find an absolute verdict in favour of plaintiffs.

Upon the points submitted by defendant, the court charged the jury, that they were not the law; that there was no evidence that plaintiffs knew of the bargain between *Peter Witmer* and *Adam Hawk*, or the payment of the money. The errors assigned were, the admission of defendant's evidence; and that the court erred in refusing to instruct the jury, that the whole of defendant's evidence did not amount to an equitable defence.

Norris, for plaintiff in error; cited: 4 *Johns. Cha. Rep.* 123; 9 *Serg. & Rawle* 16; 1 *Penns. Rep.* 425; 10 *Serg. & Rawle* 142; 3 *Binn.* 520; 15 *Serg. & Rawle* 107; 1 *Rawle* 29; 2 *Pick.* 581; 3 *Wash. C. C. R.* 70; 8 *Serg. & Rawle* 112; 10 *Serg. & Rawle* 33; 16 *Serg. & Rawle* 29; 13 *Johns. Rep.* 174; 15 *Johns. Rep.* 443; 17 *Johns. Rep.* 384; 2 *Pick.* 584; 8 *Serg. & Rawle* 452, 484; 13 *Serg. & Rawle* 157; 8 *Pick.* 122; 15 *Serg. & Rawle* 118.

Weidman and *Elder*, for defendant in error.

The opinion of the Court was delivered by

Gibson, C. J.—The argument has brought into review our former determination of this cause, the defendant insisting on the policy of adhering to precedents, even when the principle of them is wrong. Though the doctrine of *stare decisis* is of undoubted obligation; yet there seems to be a substantial difference between changing an admitted principle, and overruling a decision which is but evidence of it; the former partaking of legislation, which is foreign to the business of the judiciary, while the latter is incontestably within the pale of its authority. On this distinction alone can the blunder of a court of the last resort be remedied, even by awarding a new trial for misdirection; or the mischief of a bad precedent be abated. It is not very unusual to depart from an erroneous decision, which has not yet grown to be a rule of property, especially while the error may be nipped in the bud, and its consequences be arrested in the cause in which it was committed. Still, when such a decision has gone to the profession for the guidance of their clients, it ought not to be lightly departed from, even in the same cause. But where it can be sustained only by the sacrifice of a principle, or the overthrow of a decision more consonant to the jurisprudence of the land, it is not the privilege, but the duty of the judges to recur to fundamental principles. To determine the fitness of a case for such recurrence, is the most delicate task that can be set before a judge, and one

which calls for all his prudence and discretion. This much, however, may be safely said, that to doubt of the propriety of such recurrence, is to make manifest the propriety of abstaining from it; but that to explode a pernicious principle founded in a decision palpably erroneous, can never be a measure of doubtful propriety. Before proceeding, in accordance with these precautionary principles, to reconsider our former judgment, it is proper to remark, that the point on which it was made to turn, was suggested by the judge who delivered the opinion of the court, at a late period of the argument, and adopted in a press of business by a bare majority of the bench.

That a creditor is not bound to apply his securities, or resort to the principal in the first instance, is a conceded result of the precedents and practice of courts of equity here and elsewhere. What more is there in the case to affect these obligees? They incurred no disability to sue the principal obligor; parted with no means of obtaining satisfaction from him; disregarded no monition of the surety; impaired no security; nor did any other act or thing which is usually supposed to dissolve the contract. Nothing of the sort is pretended. They said nothing or did nothing but reform their imperfect conveyance—a thing they were compellable to do, and warn a subsequent purchaser from the principal debtor of a lien which the law had created for the security of their debt. It is said, however, that in supplying the defects of the original conveyance, they parted with the means of *extorting* satisfaction from the principal, or the purchaser under him. But they were bound, not only by the terms of the contract, but by every principle of common honesty, to do what accident had prevented them from doing effectually in the first instance. The defect in the first conveyance was so palpably the effect of accident, that no chancellor would have hesitated to amend it without terms, or superadded consideration: and what more was in fact done? A formal receipt for the purchase money was appended, which, it has been said, might impair the lien, or even discharge it, by having induced the subsequent purchaser to involve himself in responsibilities for the defendant to third persons, under a belief that the plaintiffs were paid. But it is conceded that enough to answer the demand is still in his hands; though, it is said, he may have precluded himself from a defence to his bonds by having encouraged a holder, for value, to take an assignment of them. A decisive answer to this is, that there is no evidence of any thing of the sort in the case; and a surety is not to be released for a possible or speculative injury. But viewing this receipt, not as a duplicate of that appended to the imperfect conveyance, as it really was, but as an original; it afforded no room for an inference of actual payment, or of any thing beyond the substitution of an independent security for the debt created by the contract of purchase. It is a notorious practice, in transactions of this sort, to subjoin a receipt for purchase money, not paid, but secured by a bond or mortgage taken in satis-

faction of the original contract. It is not pretended, however, that the statutory lien was gone, but that the release, being at least evidence of payment, might have embarrassed the surety in the enforcement of the lien, had he succeeded, by subrogation, to the ownership of it; and the interposition of any perceptible obstacle to his recovery, on any one of the original securities, is supposed, on the authority of *Hayes* v. *Ward*, 4 *Johns. Ch. Rep.* 123, to operate a discharge of him. To be sensible of the difference between that case and the present, it is necessary but to advert to its features. A surety who had been arrested in a neighbouring state, and probably with a view to extort payment from his supposed inability to procure bail, brought a bill for an injunction, charging that a collateral security taken by the creditor had been secretly tainted with usury by the immediate parties to it; and the allegation of this essential fact was not contradicted in the answer. That collusion with the principal gives the surety an equity, is not to be contested; for it must stand indifferent whether the security, on the credit of which the surety was drawn into the contract, has been impaired by the creditor subsequently, or in its concoction. The authorities show no difference; and the wonder, therefore, is, that instead of ordering the security to be put to the test of experiment, by an action on it, the creditor was not perpetually enjoined. The chancellor seems to have considered his omission to answer this part of the bill, not as a confession of it, but a circumstance that cast a suspicion on the respondent's title which it was incumbent on him to remove by a legal proceeding; and the business of doing so seems not to have been imposed as a duty, but accorded as an indulgence. Now what is the case before us? The vendors had appended to the conveyance the usual receipt for the purchase money, which, though competent to go to a jury, is destitute of effect, as evidence of actual satisfaction; and whether this were done before the relation of principal and surety was constituted, is, on the principle of *Hayes* v. *Ward*, entirely immaterial. If the existence of such a receipt alone were to discharge the surety, the intent of the parties would be frustrated in all cases; for the practice of delivering an acquittance with the conveyance, at one time supposed necessary, perhaps to release the title from an equitable lien for the purchase money, is so general, as to seem, to the popular apprehension, a formal part of the act of execution. But what impediment could it offer to an action on a bond, or other security, taken at the date of the receipt, or previously? The almost insensible presumption to which it gives rise, would be rebutted by the universality of the practice to which it owes its existence. I, therefore, turn from these considerations, mainly relied on in the argument, to those relied on by the majority, of which I was one, in the former decision.

It is not easy to ascertain, from the report, the specific ground on which the supposed equity was put. It seems to have been taken for granted that the receipt would not preclude the vendors, or the

surety in their stead, from showing the lien to be unsatisfied; and that the subsequent purchaser stands, in relation to it, as did the principal debtor, his predecessor in the ownership of the land. Neither was it asserted that the creditor is bound, on any general rule of equity, to proceed against the principal, in the first instance, or exhaust a fund liable to satisfaction, before resorting to the principal, or surety, at his pleasure. The decision seems to have been rested mainly on a principle borrowed by the chancellor, in *Hayes* v. *Ward*, from *Wright* v. *Nutt*, 1 *H. Bl.* 136, on which last case we are forbidden to rely as a precedent, and the foundation of which it is, therefore, the more necessary to examine. Had the principle of *Wright* v. *Nutt* not found its way into our jurisprudence through the decision of a court eminently entitled to respect, its authority would not now have been a subject of discussion. In that case the prayer of the bill was, to be protected from an action at law, till the creditor should have exhausted his means of obtaining satisfaction from the debtor's estate, confiscated by an act of attainder passed by the legislature of Georgia, but subject to the demands of those who were friendly to American independence; to which class the prosecuting creditor belonged. An injunction was granted; and the first thing to be remarked is, that the decree distinctly overruled *Holditch* v. *Mist*, 1 *P. Wms* 695, to say nothing of *Kempe* v. *Antill*, 2 *Bro. Cha. Rep.* 11; and that it has, in turn, been shaken to its foundation, if not overruled, by *Wright* v. *Simpson*, 6 *Ves.* 714. It is fair, however, to say, that it seems to have received countenance in *Cottin* v. *Blane*, 1 *Anstr.* 544. That it is entitled to as little respect on the foundation of principle as of precedent, may be inferred from the reasons given in support of it. As in the case of our former determination of the present cause, it is not easy to ascertain the specific ground on which the decision was rested. There was no proof of collusion between the creditor and the American commissioners, even if there could have been such a thing: and the suggestion in the note to *Kempe* v. *Antill*, that the creditor "had actually made application, but had not *diligently* or *honestly continued* that application," affords no colour for the conclusion attempted from it, unless it be taken for granted that the creditor was bound to make the application in the first instance; and that would bring the argument round to the point from which it started—an assumption of the principle to be sustained. Subsequently to his application to the commissioners, the creditor had gone into a court of law to enforce an undisputed legal right against the person of his debtor, and was restrained for no reason, that I can discover, but the existence of a fund within his power, the benefit of which he was required to procure in violation of the spirit of his country's laws, for one who was disabled by those laws from procuring it for himself. That this had been previously deemed a sufficient reason to control a legal right, was not pretended. The existence of a pledge, or other security, had never been allowed to prevent an immediate recourse to the person; and it certainly

could not make a difference favourable to the argument, that the pledge, in the case before the court, was not reserved by the parties, but interposed by a superior power, without the consent of the creditor. The decree may, it seems to me, be fairly set down to the score of the instinctive repugnance of courts of justice to measures of violence and wrong, inseparable from political convulsions. Something, too, may be allowed to national excitement at the disastrous result of a civil war pregnant with bitter recollections. But though it might have been fair in the mother country to say, "Since you will not permit the demands of creditors who were favourable to our authority to be satisfied out of the debtor's property within your grasp, we will not suffer his person or effects to be molested here, by those who were favourable to your independence;" still, such a measure of retaliation would have come with a better grace from the legislature, than from the courts. In fact, a bill for the purpose was brought into parliament, but dropped, on an intimation given by Lord *Thurlow*, that the powers of the chancellor were adequate to the object. A decree thus produced is certainly an insecure foundation for a permanent principle of new and specific equity. But allowing it the effect of a precedent, what does it prove? Not that the existence of a fund which would be as accessible to the surety as it is to the creditor, controls the right of resorting to the person. Such a doctrine would compel the creditor, in every instance, to apply his lien or other security, in the first place, and exhaust the fund wherever he could approach it. There may possibly be extreme cases in which a suit at law would be restrained as vexatious and oppressive—as when the creditor has but to hold out his hand to receive his debt from a fund in court—but that is not our case; nor is it pretended that there is any personal disability, on the part of the surety, to deprive him of any benefit from the lien which the creditor himself could have from it; so that the groundwork of *Wright* v. *Nutt*, which suggested the principle of *Hayes* v. *Ward*, is entirely different from that which we have here.

But the chancellor, in *Hayes* v. *Ward*, declared that cases of the sort are to be determined, not on any rule analogous to that of the civil law, but on their special circumstances; and what have we here to throw the vendors on their lien as a primary resort? The operative one is said by the judge who declared our opinion, to be the warning given to the subsequent purchaser, of the existence of the lien and the purpose of the vendors not to relinquish it; which seems to have been considered a taking to the land exclusively, that bound them on principles of election, by reason of its supposed tendency to lull the surety, and prevent him from taking measures of security in respect to the principal. That a creditor is bound to elect between friends or persons concurrently liable, or is compellable to pursue exclusively the one to which he first has had recourse, will not be pretended. In the movement of the vendors for the preservation of their lien, there was nothing to disarm the surety, or

that would not have been understood by a man of ordinary sagacity. So far from holding out to him an assurance of exemption, the notice evinced but a prudent attention on the part of the vendors to the preservation of all their securities. I will not say, that a subsequent purchaser of a title derived through an order of sale by the orphan's court, is not bound to take notice of the lien, or that warning him of it was not superfluous; but the course pursued was at least an honest one, and proper to apprise him that a part of the purchase money was still unpaid; especially as a formal receipt had been given when the period of payment fixed by the conditions of the sale had elapsed. It was by no means inconsistent with the vendor's duty to the surety: for it is not easy to see how the latter could be prejudiced by a measure taken for the common benefit, and thought, though perhaps erroneously, to be necessary to his protection. I am not prepared to say that notice was indispensable to the preservation of the lien, as a knowledge of its original existence might be sufficient to put a purchaser on inquiry as to the fact of its subsequent extinction; or that the vendors were bound to more, as regards the surety, than abstinence from positive acts that would impair it: but clearly the notice, being a measure of extreme caution, for the benefit of all parties, ought not to have inspired the surety with an expectation of exemption. But no prejudice was in fact suffered by him; for it is not pretended that he was induced to forego the use of any means to procure indemnity from the principal; and as to the defendant, his executor, it is sufficient that the assets are yet in his hands. Even were they not, the distribution of them, without having taken refunding bonds, would have been such negligence as to preclude a defence on that head. Evidence of the facts contained in the notice of special matter, furnishing as they did no substantial defence, ought therefore not to have been admitted. As to the other branch—that the claim was not preferred within the period of the publication of notice, fixed by law for the creditors to come in—that would be made available only by showing the assets to be deficient, which is not pretended. Notwithstanding our repugnance to depart from a previous decision, therefore, we are satisfied that justice requires the cause to be put before another jury.

Huston, J.—This cause has been before this court twice before, and is reported in 10 and 16 *Serg. & Rawle.* The decision of the court in the first report turned on whether the bonds in suit were joint, or joint and several, and is certainly not free from difficulty. The construction there put on those bonds is not, I think, supported by any authority; and the insertion of the words, "*each of us,*" after the names of the obligors, is a liberty with the contract of the parties, which courts do not often assume; and this decision is, I think, inconsistent with subsequent cases.

The opinion of the court in the present instance directly overrules that given by this court in 16 *Serg. & Rawle;* and does more, for

the facts are brought before us in the present instance more fully, than they were in that case. I do not know that I would trouble the profession with a dissenting opinion, were it not that this is the second instance at this adjourned court, in which a bare majority of the court have overruled a prior decision in the same cause. No doubt every court which has ever existed has given decisions which, on reflection, require correction. Much and full reflection ought, however, to be given by the court which overrules a prior decision of its own, given in the same cause, between the same parties, on the same facts. This, says chancellor *Kent*, ought never to be done, but on the most cogent reasons. In the present case the facts are not the same, but where they differ they make a stronger case for the defendant. After the plaintiff had read his two bonds, payable on the 1st of April 1814, and on the 1st of April 1815, and the receipts indorsed on them, he rested.

The defendants then gave in evidence the petition of the heirs of *John Carper*, praying for a sale of the lands of said *John*, which had been valued, and which his heirs had refused to take at the valuation. The court ordered said lands to be sold on the 16th of March 1810, on the following conditions; *one half the purchase money to be paid in hand, and the residue in five equal annual payments.* At an orphan's court, 1st of May 1810, the administrators reported a sale to *Adam Hawk* of one hundred and sixty-seven acres and ninety-one perches, at 26 pounds 7 shillings and 6 pence per acre—and other parcels to different purchasers. "*All sold on the terms in said order prescribed.*" The report was approved, *and the court decreed* "*that the sale, so* as aforesaid made, be and remain firm and stable for ever." Not one word about when the deed was to be made, in the record.

The record then, as presented to us in the paper book, states, that defendants offered in evidence the matters contained in the notice of special matter.

It will be observed, that this does not purport to be the whole of the offer, but only the part objected to. What the rest was we know not. After the court had received the testimony so offered, the defendants gave in evidence the records of common pleas of Lebanon county of the 5th of August and 7th of November 1832, showing the discharge of *Adam Hawk* as an insolvent debtor.

The plaintiff then gave in evidence the will of *Michael Hawk*, dated 14th of September 1813, and probate in 1815; and called *John Gloninger*, who proved that he drew the deed from the administrators of *John Carper* to *Adam Hawk* in March 1817; that he believed no money was then paid; that it is usual to give receipts such as this when bonds are taken for the gales; that he saw no bonds; that in drawing the deed from *Adam Hawk* to *Witmer* he discovered the defect in a former deed to *Adam Hawk*, drawn by *Hollingsworth*, that contained no words of grant, &c.; and informed the parties that *Adam Hawk* and his counsel directed him to draw another deed from *Carper's* administrators to *Adam*, which he did, and the administra-

tors came and executed the deed willingly without making any objection. After stating something not material about *Michael Hawk's* will, he said the receipt would imply that some money was paid at the time of executing the deed. (By referring to the deed, the receipt was in these words, "*Received on and before the date of the* within written indenture from the within named *Adam Hawk* the sum of 4700 pounds 17 shillings and 6 pence lawful money of Pennsylvania, it being the full consideration money on the said indenture mentioned." Signed by the three administrators.) But he remembered nothing of any being paid. "There was nothing said about the purchase money being unpaid." He then proved something about the bond of indemnity given by *Adam Hawk*, *Martin Thomas*, and *John Wolfersberger* to *P. Witmer*, which bond was read, dated 3d of April 1817, the same day as the deed of *A. Hawk* to *Witmer*. The plaintiff then gave in evidence again the full record of the proceedings in the orphan's court of Dauphin county respecting *John Carper's* lands.

It was then admitted by the parties, that about 4000 dollars were retained by *Witmer* after *Geddis's* notice to him—say two bonds of 738 pounds 2 shillings and 6 pence each, payable in 1819 and 1820; and it was stated in court during the argument, that *Witmer* attended in court at this and the last trial with the money in silver.

The plaintiff gave also in evidence the record of two suits, No. 15 and 16, of November term 1818, by the administrators of *Carper* against *Adam Hawk*, and judgments thereon; and also gave in evidence certain judgments against *Adam Hawk*, to which they contended the bond of indemnity applied; and offered and tendered to defendant an assignment of the rights of the plaintiff against the fund fixed by the sale in the orphan's court, dated 7th of August 1829.

The defendant gave in evidence the record of two suits, No. 23 and 24, of November 1821, discontinued. These, I understand, were a *scire facias*, and an ejectment by the present plaintiff against *Witmer*.

Many points were, according to our custom, submitted to the court; but in the argument here, the counsel said they would rely on the bills of exception to testimony and the eleventh point.

The eleventh point was, "that from the evidence given at the trial, and from the tender now made by *Robert Geddis* and *Samuel Carper*, of the assignment, by their deed, of all their right and their remedies to the administrators of *Michael Hawk*, to substitute him in their place, and clothe him with all their securities relating to the real fund, and from their offer to file this deed of assignment under the direction of the court of record in this cause, upon their obtaining a verdict, either conditional or absolute: from all this evidence, and from this tender, the plaintiffs are entitled to an absolute verdict."

This was answered by the court, by saying, that from all the

evidence stated in the point, together with the tender of the deed of assignment, the plaintiffs were not entitled to an absolute verdict, if the jury should be of opinion that *Michael Hawk* was only a surety in the bond.

This brings the cause to the third error assigned, viz. that in the trial of this cause in the court below, the equity and the law of the land have been manifestly departed from in the charge of the court and verdict of the jury, and in the opinion of the court in refusing to exercise their peculiar and exclusive power to vindicate and preserve the law of the land from invasion and violation by a jury.

It may be admitted, that both at law and in equity the situation of sureties is materially different from what it was less than a century ago. At law, all who signed the bond or writing were considered equally principals, and no averment that one was surety was admitted. I do not know that at present any judge or lawyer would say, it may not be proved that one of the obligors was a surety; and that certain acts of the obligee will discharge a surety, which would not discharge a principal. *Theobald on Principal and Surety* 117—130; 17 *Johns. Rep.* 391.

Even in chancery, I think Lord *Hardwicke* refused to interfere for a surety in a manner which is now so much the course of that court that no man would question it. Certain acts of the obligee seem to be admitted everywhere as amounting to a discharge of a bail warranty; but what will amount to such act is not exactly agreed upon in all courts.

The following may perhaps safely be stated as a part of the cases in which a surety is discharged by the act of the creditor.

Where the principal is discharged either totally or on paying a part, the surety is discharged; and in equity, an agreement to discharge the principal, and an assignment by the principal in pursuance of such agreement, discharges the surety, though no release of the principal be actually executed. *Theobald on Principal and Surety* 114, 115, 116.

Where the parties (that is, creditor and principal) make any new agreement inconsistent with the terms of the original one; or if they agree to make any alteration, either in the terms of the original agreement or in the mode of performing them, without the consent of the surety; the surety is discharged (*Theobald* 119 to 122): and the court are not to inquire minutely what injury the surety sustained, it is enough that he might have been prejudiced; and they are not to inquire what injury he did or will sustain. *Theobald* 123 to 131.

Where the creditor, without the consent of the surety, agrees to give time to the principal, the surety is discharged. *Theobald* 127, 180 to 182. It is not, however, the law, that the bare negative act of refraining from suit; but some agreement of the creditor which ties his hands and prevents him for a time from suing; which discharges the surety. *Theobald* 136; *Cope* v. *Smith*, 8 *Serg. & Rawle* 112.

[Geddis v. Hawk.]

Where the creditor parts with securities, or any fund which he would be entitled to apply in discharge of the debt, the surety is exonerated, at least to the extent of such securities; because securities which the creditor is entitled to apply in discharge of his debt, he is bound either so to apply, or to hold them as a trustee, ready to be applied should the surety desire it. *Theobald* 143; 8 *Serg. & Rawle* 452 to 458. And this continues if there be two judgments against principal and surety. 8 *Serg. & Rawle* 458; *Union Bank* v. *George*, 5 *Peters* 99. And this principle is put in stronger and more appropriate terms by the chief justice in 13 *Serg. & Rawle* 159. *Where the creditor has the means of satisfaction, either actually or potentially* in his hands, and does not choose to retain it, the surety is discharged.

On this same principle, this court, in *Commissioners of Berks* v. *Ross*, 3 *Binn.* 520, decided, that the agreement to permit a principal debtor who had been arrested, to enter common bail, in consequence of which he left the state, discharged the sureties.

The same principle goes to discharge a surety, where certain things are by the agreement stipulated to be done, which would benefit the security or lessen his risk, and the creditor neglects to have these things done. *Theobald* 146, 147. Much more will it apply where the creditor actually gives up what existed at the time of the engagement of the surety.

When a surety cannot, in a direct manner, or in his own person, obtain the benefit of securities or funds which are by the agreement set apart for the creditor, equity will restrain the creditor from proceeding against the surety until he has resorted to these funds. *Theobald* 256; *Hayes* v. *Ward*, 4 *Johns. Cha. Rep.* 123.

I could cite, without much trouble, many other authorities, but they will be found in the books and cases referred to, and some others I shall mention. The modern doctrine, and that of common justice and common sense, is, that there is an understanding in all cases, that the creditor ought to look to the principal, and not unnecessarily to the surety: that he is at least bound not, in any the slightest degree, by any act of his, to lessen the security of, or otherwise do injury to a surety.

Courts of equity, says Judge *Spencer*, 17 *Johns. Rep.* 392, 394, when they interpose to compel, at the instance of a surety, a creditor to sue the principal, undoubtedly proceed on the sound and just principle, that it is the duty of the creditor to obtain payment of the principal debtor, and not of the man who is a mere surety. In every such case, a court of equity proceeds on the pre-existing equitable obligation, binding on the conscience of the creditor, to exert himself to obtain payment from the real debtor, who ought to be coerced to pay it. And again he says, where is the man who will boldly avow the unjust and immoral principle; that, after his debt has become due, and he has been solicited by the surety to proceed and collect it, he will abstain from suing, with a view of favouring

the principal and throwing the loss on an innocent man, who from motives of friendship or humanity became a surety. *Theobald's* treatise is replete with the same doctrine. The supreme court of the United States say, in *Bank* v. *Gracy*, 5 *Peters* 114, there is a moral obligation resting on the bank to do the very thing their attorney stipulated to do, i. e. to issue execution against the principal. Every consideration of justice and equity, in a moral, though not in a legal point of view, called on them to use due diligence to obtain satisfaction of the debt from the principal, before recourse was had to the surety.

Let us now compare some of these principles, and apply them to the facts of this case. It must be observed, that no one part of the proceedings in the orphan's court to procure the sale, nor the order or decree of the court, say one word about the time when a deed was to be made by the administrators. The act of assembly of 2d April 1804, sect. 11, directs that "the court shall confirm the sale and decree the estate in the premises so sold, to be *transferred* and vested in such purchaser, as fully as the intestate held the same at his decease, *subject and liable to the payment of the purchase money*, according to the terms prescribed by the court in the order of sale." The bonds were given on the 1st of April 1810. The first deed drawn by *Hollingsworth*, and which was defective, and seems to be admitted to have been inoperative as a deed, was not made till the 6th of April 1811. The three first payments seem to have been made; but those due the 1st of April 1814 and 1815, were unpaid. Two years after the last was due, *Adam Hawk* agreed to sell to *Witmer*, and calls on the administrators for another deed. They were under no obligation to make him a deed until the money was paid; had entered into no contract binding themselves to make him one. The money had been due two or three years, and ought to have been collected and paid to the heirs of *Carper*. *Michael Hawk*, the surety, had been dead two years, and his executors had given the notice prescribed by law, to them if they claimed, and to all claimants against his estate, to produce their demands. In the face of all this they make a deed and give a receipt, *that on that day and before they had received the whole purchase money*, &c. The purchaser could not have supported a suit at law for not making the deed until he paid or tendered the purchase money. No case has been cited to show that a chancellor would have decreed a deed, and no *dictum* referred to; no principle stated on which it can be predicated that he would have so decreed. The making the deed, whether we refer to the first in 1811, or to the second in 1817, was, as much as in them lay, giving up the power they had to compel the payment of the purchase money. The title was in them; the power to compel the payment out of the 8000 dollars paid in hand by *Witmer* was in them; and they carelessly, or wantonly, or wickedly refused to exercise it; and it seems to me to fall within the spirit of many of the authorities cited, and within the very words of the present chief justice in *Lightenthaler* v. *Thomp-*

son, 13 *Serg. & Rawle* 159; *where the creditor has either actually or potentially the means of satisfaction in his hands and does not retain it, the surety is discharged.* One word would have produced the money. I do not say the land does not continue liable for this money in the hands of *Witmer*. It is not necessary to decide on that point; to a certain extent it is liable. The record is not full in that part which relates to *Witmer;* it states that he has retained 4000 dollars, but it was stated by the counsel on both sides, I think, in addition, that *Witmer*, at every trial of this cause, had attended in court with his money in silver. If this, or part of it is so, there may be a question whether interest can be recovered from *Witmer*. And if he has been ready to pay his money from 1822, and brought it into court, (though that, except in one point of view, may be immaterial in this cause), it may be found impossible to recover interest from him. And who is to lose that interest, the defendants or the plaintiffs? The plaintiffs have varied the situation of the parties, and by so doing have discharged the defendant; and we are not to enter into disquisitions as to how far that alteration will affect them.

In one point of view this case presents a novelty. By the order of the court, and the terms of the act of assembly, which forms the contract, the land was, and perhaps is, bound to pay this money. The owner of the land is notified of this by the plaintiffs, and told he will be held liable, and forbidden to pay any more to *Adam Hawk*. He retains his money for the plaintiffs; he keeps it ready; but *Adam Hawk*, or those to whom *Adam Hawk* had assigned *Witmer's* bond, forbid him to pay to plaintiffs: and perhaps he is right in not paying till a judgment against him in favour of plaintiffs. The plaintiffs say and insist, that *Witmer* is liable, and that the defendants can, after paying, recover from him. Yet the plaintiffs, who insist he is liable, have twice sued him, and twice discontinued their suits; once after the opinion of this court on facts not so full for the defendants as appeared at this trial. Did the plaintiffs feel it their duty, in order to reach a surety, to discontinue twice against the principal? or did they feel it their duty to obtain from this court a reversal of its former decision, lest they should be guilty of the sin of collecting money from the real debtor and proper fund? or is there some wilful or some fraudulent design to oppress the defendants, and favour *Witmer* or those who hold *Witmer's* bond? In *Cope* v. *Smith*, 8 *Serg. & Rawle* 118, Chief Justice *Tilghman* intimates that there may be cases of such collusion by a creditor as would discharge a surety. And if a jury would find that some such collusion existed in this case, it could not be said they found without evidence.

The counsel for plaintiffs, in concluding, told us, if plaintiffs were sent to *Peter Witmer*, they would be delayed and perhaps defeated; but that the defendants could recover from him at once. I cannot understand this, or if I do understand it, it must mean that the plaintiffs will lose the interest in a suit against *Witmer*, or that *Witmer*

can prove something against the plaintiffs more than we know: perhaps I don't understand it at all.

It is now twenty-two years since the sale. Will the lien for the purchase money continue for ever? There was no offer to bring suit, or to permit the defendants to bring suit, until during this trial. If the conduct of the plaintiffs in varying the situation of the parties, in giving up the power of compelling payment by returning the deed, of releasing the lien as far as in their power, of refusing to apply to the proper and peculiar fund, or permitting the defendants to resort to it, do not estop the plaintiffs from an absolute verdict in this case; it must be, as it seems to me, because the law of the whole civilized world, as administered for the last fifty years, is to be changed.

But another matter was much urged during this cause. Not content with insisting that this court had mistaken the law, juries generally, and especially those of Lebanon county, were assailed; and not only juries, but courts who did not control them, and keep them under proper subjection as to their power over facts. On this subject I have heard much, and had, as lawyer and judge, nearly forty years experience. Of perverseness and prejudice in successive juries in finding against the right and law of the case, I have heard much, but I know nothing. I have seen verdicts set aside, and rightly, and where there is no dispute as to facts, and the jury undertake to find the law in opposition to the courts, they are always rightly set aside. But I neither know, nor ever heard of successive juries doing so in any case. A single jury may have done so, but it is a rare occurrence; and for once that I have known a jury undertake to decide the law in opposition to the court, I have known ten cases where the court drew different conclusions of facts from the jury, and in at least nine out of ten of such cases the jury were right and the court wrong. A court which undertakes to control a jury as to the credibility of witnesses, or as to the facts or inferences from the testimony in a cause, is as much out of its duty as a jury who undertake to overrule the court as to matters of law.

I do not know what is meant by the phrase, that in our equitable jurisdiction the jury find the facts and then the court decide the law; I know the constant and necessary practice, but those who use the same phrase, seem to mean something different; they say they mean something different. If it be meant that the jury must go out and find the facts, and come in and state them to the court, who are then to decide the cause; it means what is impracticable and absurd. Under our present practice, that the court states the law and the jury retire and find their verdict, whether in legal or equitable contests, I believe justice is as well administered in this state as in any part of the world. Some more equitable authority ought to be given in a few cases; but of all the modes which have been proposed of improving our judiciary system, any one which restrains the weight and power of juries, as I have seen it exercised, would be the last in which I would concur.

Our usage and law is, that a party may give in evidence the facts on which he relies as an equitable defence: these facts may be the testimony of persons who saw and heard the whole of the transactions, or of the agreement of the parties in writing, or it may be of facts and circumstances, admissions, &c., from which a jury infer that certain facts took place or agreements were made; in other words, it may consist of direct or circumstantial testimony. I do not understand, perhaps, what is meant by a case calling for strict proof. If it means that circumstantial proof from which a jury can and do infer a fact, is not equal to positive proof of that fact, I deny it to be law. There is no possible case in civil or criminal law in which any fact may not be made out by circumstantial as well as direct proof; except, perhaps, where a positive legislative enactment requires a specific kind of evidence; and the power of the jury is peculiarly their own in determining on evidence, all or a part of which is circumstantial. These observations may not appear pertinent to the record in this case, but were required by the course of argument in the case.

I am, then, of opinion, that the whole of the evidence was rightly admitted. That unless the facts on which an equitable defence is founded go to a jury, our equitable jurisdiction is, to all useful purposes, at an end. That it may be possible for a court in some cases to say *a priori*, Your proof, if given, will not amount to a defence: yet there are few such cases come into court, and this is not one of them. No counsel can state precisely what a dozen witnesses will state; no court has the right to judge of the credit of each of those witnesses, or to select what it will believe and what it will reject. The jury is an essential part of our judiciary—no court will long continue to assume the functions of a jury, and none ought to be permitted to do so.

I am further of opinion, that if the jury found the facts in a certain way, there was a valid defence in law and equity, and the judgment ought to be affirmed.

Judgment reversed, and a *venire de novo* awarded.

Stauffer *against* The Commissioners.

A lien is a necessary and inseparable incident of seizure in execution, by the principles of the common law. A treasurer's warrant, therefore, against a delinquent collector of taxes, levied on his real estate, creates a lien thereon, which will have priority to subsequently entered judgments, and a sale of the estate upon such proceeding will vest in the purchaser a good title.

WRIT of error to the district court of *Lancaster* county. *Hays*, president.

Ejectment by *The Commissioners of Lancaster County* against *George Stauffer*, for a house and lot in the city of Lancaster.

George Stauffer had been a collector of county tax for the city of Lancaster, for the years 1824, 1825 and 1826. On the 3d of September 1825, the county treasurer entered in the office of the prothonotary, a transcript of a balance due by *Stauffer* to the county, of 2339 dollars and 15 cents. On the 27th of June 1829, the treasurer issued three several warrants, directed to the sheriff, against *Stauffer*, for balances due in the years 1824, 1825 and 1826, respectively, amounting, in all, to 2719 dollars and 39 cents; by virtue of which the sheriff levied on the house and lot in controversy. The treasurer issued warrants, commanding the sheriff to sell the property levied, and it was sold, and conveyed to the commissioners of the county. When the deed was offered for acknowledgement, in court, the 26th of November 1829, it was objected to by the judgment creditors of *Stauffer*, but the objections were overruled, and the deed acknowledged. From the 13th of July 1829 until the 21st of September 1829, several judgments were entered against *George Stauffer;* upon one of them, in favour of *Christopher Hager*, a *fi. fa.* was issued to January term 1830; by virtue of which the same house and lot was levied; and upon a *vend. expos.*, subsequently issued, it was sold to *Emanuel C. Reigart*, who now claims the same. From these facts the question arose, whether the proceedings under the treasurer's and commissioners' warrants gave a good title to the plaintiffs, and the court below was of opinion that they did, and gave judgment accordingly, which was the subject of the only exception argued.

Reigart, for plaintiff in error, cited the act of 1724, 1 *Dall. Laws* 218, and 3 *Yeates* 50, where that act received a judicial construction, which probably gave rise to the act of the 11th of April 1799. This being a question between creditors, and the plaintiff's title dependent upon lien, it is only necessary to inquire whether the warrants of the treasurer created such a lien upon the property, as that a title might be founded upon it. There is no statute which au-

thorises such a lien; and public convenience and safety require that our courts should persevere in the course which they have heretofore pursued, to discountenance constructive liens. 7 *Serg. & Rawle* 72; 13 *Serg. & Rawle* 227; 16 *Serg. & Rawle* 17, 412; 9 *Serg. & Rawle* 109.

Long, for defendant in error, whom the court declined to hear.

Per Curiam.—The transcript directed by the sixteenth section of the act of 1799, was put on the footing of a judgment, in order to give notice of the existence of the lien, and, perhaps, to create it; but it was not intended to operate as a judgment, in order to found the process of execution, which would, in that aspect, have been directed to issue from the court, and not from the treasurer. There is nothing to show that the treasurer might not seize and sell without any transcript at all, provided the property remained unincumbered in the hands of the collector. And why should not the seizure create the same lien which is incident to every process of execution at the common law? Because, say the subsequent creditors, there can be no other lien than the one created by the act of assembly. That lien was created to enable the commissioners to indulge the delinquent for the period limited, without jeoparding the debt, and to give them time to take such measures as might be reasonable, in order to turn the property to the best account, but not to provide the securing of it after seizure. For that purpose, a lien is a necessary and inseparable incident of seizure in execution, by the principles of the common law. Property levied is in the custody of the law, the end of which might be prevented if creditors could subsequently acquire a paramount interest in it. In regard to chattels, this undoubtedly holds, so far as to afford the creditor an opportunity to obtain satisfaction, by a reasonable pursuit of his remedy; and it equally holds in respect to land, which, with us, is a chattel for the payment of debts. The lien of a *testatum* execution has no other foundation; and, as regards the expired lien of a judgment, within the county, it is not to be doubted that an execution levied would, under the same limitation, create a new lien, though it may not, under the last act of assembly, continue or extend the old one. By this is meant, that the levy would protect the property for a reasonable time, under the process of execution. That case is strictly analogous to the present, in which, though intervening incumbrances would come in between the expiration of the original lien, yet the incidental lien of the latter is not to be displaced by subsequent incumbrances, without gross delay on the part of the treasurer, in the prosecution of the remedy.

Judgment affirmed.

Longenecker *against* Zeigler.

A creditor having obtained a judgment for his debt, subsequently received payments from his debtor, which were not credited upon the judgment: the defendant's real estate having been sold, the whole amount of the judgment was paid to the plaintiff by the sheriff. Held, that an action will lie to recover back the amount improperly received, and that such action could not be maintained in the name of the defendant in the judgment for the use of his creditor, but must be in the name of the sheriff. *Quære*, Whether such action might not be maintained in the name of the creditor who was beneficially interested in the recovery.

ERROR to the district court of *Lancaster* county.

This was an action for money had and received by *Christian Longenecker* for the use of *Samuel Bossler* against *Conrad Zeigler*, and arose out of these facts. *John Esterlee* had borrowed from *Conrad Zeigler* 1200 dollars, and gave him his bond for it with *Christian Longenecker* as surety. A judgment had been obtained on this bond, and subsequently several years' interest was paid to the plaintiff; afterwards, the real estate of *Longenecker* was sold by the sheriff, from whom *Zeigler* received the whole amount of his judgment. This suit was brought to recover the amount improperly received by *Zeigler* in the name of *Longenecker* for the use of *Bossler*, who was a judgment creditor of *Longenecker*, and who would have received the money if *Zeigler* had not taken more than he was entitled to. Two questions arose: whether the money could be recovered back in this form of action; and, whether the action was rightly brought in the name of *Longenecker*. The court below was of opinion, that the action could not be maintained in the name of the present plaintiff, and rendered a judgment accordingly.

Jenkins, for plaintiff in error.
Parke, for defendant in error.

PER CURIAM.—The name of *Longenecker* was used as the legal plaintiff, under the supposition that he had the legal title; but in this species of action, which, in substance, is said to be a bill in equity, there is no distinction between legal and equitable title, he being the legal party who is entitled to the money. But *Longenecker* was not entitled beneficially, or even as a trustee for the creditors; for the law is not so unreasonable as to attribute to him the ownership of that of which it has itself divested him, and appropriated to the extinguishment of his debts. Who, then, was entitled to the money here? The sheriff's is the hand to pay out, and a mispayment may undoubtedly be recovered back by him, in an action founded on the special property which he has in the money as the bailee of the law; so that the action here might have been brought

with perfect safety in his name. It might also, perhaps, have been brought in the name of *Bossler*, the creditor ultimately entitled; for though there is no privity between him and the defendant, the money, where it has been received *mala fide*, may be pursued specifically on the owner's right of property. Here there would seem to be enough in the case to authorize a jury to find, that the money was received *mala fide*, or, perhaps, a legal presumption to that effect would necessarily arise from the facts. But all difficulty would have been removed by proceeding in the name of the sheriff.

Judgment affirmed.

Sommer *against* Sommer.

When a judgment has been opened at the instance of creditors, upon an allegation that it was fraudulent as against them, the defendant in such judgment is a competent witness for the creditors to establish the fraud.

ERROR to the district court of *Lancaster* county. *Bradford*, President.

Jacob Sommer executed a judgment bond to his father, *Leonard Sommer*, for 2088 dollars and 38 cents, which was entered of record.

The creditors of *Jacob Sommer* alleged, that this judgment was fraudulent as against them, and at their instance it was opened so as to let them into a defence. Upon the trial of the cause, the creditors offered *Jacob Sommer* as a witness to establish the fraud: he was objected to, on the ground that he was not competent; but the court overruled the objection; which was the subject of the only error assigned.

Reigart and *Ellmaker*, for plaintiff in error.

A defendant, in a judgment, should not be permitted to give evidence to invalidate the bond on which the judgment was rendered. In *Wolf* v. *Carothers*, 3 *Serg. & Rawle* 240, it is decided that the declarations of an obligor can not be received to invalidate his own bond; and the same principle is recognized in *Whiting* v. *Johnston*, 11 *Serg. & Rawle* 328. The lips of the plaintiff were sealed, while the defendant was permitted to swear away his debt, or what was the same thing in this case, to take from him the only thing which made his judgment of any value—a preference over other creditors. In the case of *Jacoby* v. *Laussatt*, 6 *Serg. & Rawle* 300, the interest of the witness was equally balanced between the plaintiff and defendant: not so in this case, for his interest was to destroy his father's judgment, that his other creditors might be paid, and he be thus relieved from them. It does not comport with the policy of the law

to permit an insolvent to postpone securities which he had previously given.

Montgomery and *Norris*, for defendant in error.

The issue in this case was not to create or destroy a liability as between the plaintiff and defendant in the judgment; for whether fraudulent or not as to creditors, as between the parties to it the judgment was good, and so remained. 5 *Binn.* 76, 109. The assignor of a bond is a competent witness to prove that it was fraudulently given to him; *Baring* v. *Shippen*, 2 *Binn.* 154, where the principle is strongly stated, that if a witness be disinterested in the event of the suit, he may testify to what would elsewhere affect his interest. The rule that a man can not invalidate his own deed, is confined to negotiable instruments. *M'Pherran* v. *Powers*, 1 *Serg. & Rawle* 102; 4 *Serg. & Rawle* 494; *Bank* v. *Hillard*, 5 *Cowan* 153. The case of *Walton* v. *Shelly*, has been overruled in England, and never recognized here. *Per Gibson*, C. J., 4 *Serg. & Rawle* 497.

Per Curiam.—Had the court awarded a collateral issue, formally, to try the question between the obligee and the other creditors, it is clear the obligor would have been a competent witness. For though it might be inferred, from an intimation in *Wolf* v. *Carothers* of his being a witness to sustain the bond because his evidence tends to decrease the fund, that his evidence tends to increase the fund where he is called to disprove the debt; yet it will be found that that consequence does not follow, and that either way he has no interest in the event, whether immediate or remote, certain or contingent. By sustaining the bond, it is admitted that he gains nothing, as the obligee is then to be paid with the rest; and by defeating it it is equally clear that he gains nothing, because, as against all but creditors, the obligee is still to be paid, the judgment standing good against the obligor and claiming under him, and ready to intercept his effects on their passage to his hands after the other creditors are done with them. In all such cases, the controversy is between the creditors exclusively; for be the judgment fair or foul, it must be satisfied out of the mass of the debtor's effects, or out of his resulting interest, if any thing remains after satisfaction of the other creditors. What then is the difference, in this respect, between a collateral issue and that which was tried here? The judgment was opened so far as to let the creditors into a defence on the merits, in order to show that the bond and warrant was without consideration, and given to delay, hinder and defraud creditors; consequently, for every other purpose it stood good, and especially against the defendant, as regards whom, execution might have issued on it without having it closed, or any other preparatory step being taken, the moment the question of priority was settled among the creditors. This method of trying the question of fraud, by opening the judgment so far as to give the party intended to be defrauded an opportunity of showing the ex-

istence of collusion, is a very common one, and though less technical, it is quite as convenient as a collateral issue, requiring less nicety in the pleading, and serving equally well to inform the conscience of the court in directing the process of execution. It was recognized in *Whiting* v. *Johnson*, 11 *Serg. & Rawle* 328, as being equivalent in all respects to a feigned issue. The consequence is, that the obligor was not a party; and that standing free from interest in every respect, he was a competent witness.

Judgment affirmed.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

LANCASTER DISTRICT, MAY TERM 1833.

Commonwealth *against* M'Allister.

A writ of *certiorari* from the supreme court to the judges of the court of quarter sessions, will not be quashed, because the party to the proceedings in the court below was dead when it issued.

MOTION to quash a writ of *certiorari*.

This writ of *certiorari* issued to the judges of the court of quarter sessions of *Dauphin* county, to remove the record and proceedings which had been instituted there by *Archibald M'Allister*, to recover damages which he had sustained, by reason of the construction of the Pennsylvania canal. After the proceedings were confirmed by the court below, and before this writ issued, *M'Allister* died, which was the ground of the motion to quash.

Elder and *Hopkins*, for the motion.
Foster, contra.

The opinion of the Court was delivered by

ROGERS, J.—An application has been made to quash the *certiorari*, because, at the time the writ was issued, *Archibald M'Allister*, the defendant in error, was dead. *The Commonwealth* resists the motion to quash, and having suggested the death of the defendant in error,

[Commonwealth v. M'Allister.]

asks the court for a rule upon *John C. M'Allister*, the surviving administrator, to appear and plead to the errors assigned, on or before the first day of the next term. A *certiorari* is a writ, where the court would be certified of a record in another, or sometimes in the same court. And he to whom the *certiorari* is directed ought to send the same record, or the tenor of it, as commanded by the writ; and if he fail to do so, then an *alias* is awarded; afterwards a *pluries*, with a clause of *vel causam nobis significas;* and then an attachment, if good cause be not returned upon the *pluries*. When the record is removed either by *certiorari* or writ of error, the supreme court have power to examine the record upon which judgment was given, and on such examination, to affirm or reverse the same, according to law. The *certiorari* is a judicial writ, issuing out of the court to which the proceedings are to be removed, and is directed to the judge or officer who has the custody of the record, or other matter to be certified. In this case, the *certiorari* is directed to the judges of the court of quarter sessions of Dauphin county, commanding them to certify the proceedings had on the application of *Archibald M'Allister* for damages occasioned by the Pennsylvania canal. The writ is entitled in the name of *The Commonwealth* v. *M'Allister*, and in obedience to the writ, the court of quarter sessions have certified the record and process, and have returned the record, together with the writ as they were commanded, and this was the only return the court could make. It was not for them to inquire into the death of *Archibald M'Allister*, for a return by them of that fact, without the record and process, would have been an insufficient return, which, if persisted in, would have rendered them liable to attachment. Besides, if there were an irregularity in this; yet, we have the record before us, and it is a principle of law well settled, that third persons cannot object to the misdirection of a *certiorari*, to remove a cause from an inferior court, if the proper officers in whose keeping the record was, waive the objection, and return the record. *Daniel* v. *Phillips*, 4 *Serg. & Rawle* 499. The cause is entitled in the name of the parties on the record, to identify the proceedings which it is intended to remove. It has never been the practice in this state, to serve a copy of the writ on the attorney on the record, as in England; nor is the writ, as is the case in the supreme court of the United States, accompanied with a citation to the party. The court of review will take care that notice is given, and that the proper parties are put on the record; and this object is attained, on motion, by a rule similar to the rule asked for by the counsel for the commonwealth.

It is ordered by the court, that the rule to quash, &c. be refused, and that the rule to appear and plead, be made absolute.

Beard *against* Deitz.

A judgment against the husband of an heir at law is a lien against his life estate, and upon a sale made by the administrator of the ancestor of the whole estate, by virtue of the intestate laws, such judgment creditor is entitled to be paid the amount of his judgment, when the proceeds due and payable to such husband are sufficient for that purpose.

ERROR to the district court of *York* county.

Peter Kline died intestate seised of real estate, leaving issue several daughters, to one of whom *George Stoutzenberger* was married. After the death of *Peter Kline*, *George Beard*, the plaintiff, issued a *fieri facias* upon a judgment which he had previously obtained against *Stoutzenberger* and levied it upon all his interest in *Peter Kline's* real estate. *John*, one of the children of *Peter Kline*, then presented a petition to the orphan's court for a writ of partition and valuation of his father's estate, which was proceeded in to a sale of the said estate by the administrators. This suit was then brought by *Beard* against the administrator of *Kline*, to recover from him the amount of his judgment against *Stoutzenberger;* and it was admitted that the interest upon the share of *Stoutzenberger* in the hands of the defendant was sufficient to pay *Beard's* judgment if he were entitled to recover it. The court below, upon these facts, rendered a judgment for the defendant, which was assigned for error.

Gardner and *Lewis*, for plaintiff in error.
Hambly, contra.

The opinion of the Court was delivered by

Rogers, J.—The judgment and levy were a lien on the life estate, which *Stoutzenberger* had in the land, in right of his wife *Catharine*, the daughter of *Kline*. And if the interest of *Stoutzenberger* had been sold by the sheriff on the execution, the creditors would have been entitled to the proceeds. But *Beard* was prevented from reaping the fruits of his judgment by the proceeding in the orphan's court, at the instance of one of the heirs of *Kline*. After the confirmation of sale, the creditors might have had the money brought into the court, and in the distribution of the fund they would have invested *Catharine's* share, the one seventh, the interest to be appropriated in satisfaction of the debt during the life of her husband; for unless this could be done, it would be in the power of the heirs to deprive creditors of their lien in all such cases. The property was sold by the administrator in pursuance of the order of the court, and is now in his hands for appropriation. It is not the case of a secret

lien, for the lien is by force of the judgment and levy, which follow the money into the hands of the administrators, and of which he is bound to take notice. At all events, he has now notice before the money has been paid over. The case finds, that the interest which accrued on the wife's share, before her husband's death, was sufficient to pay the plaintiff's debt.

Judgment reversed, and judgment for the plaintiff.

Commonwealth *against* Simonton.

Where the condition of a recognizance was, that the principal would "do and perform all the things required by law of him as guardian as aforesaid, and shall faithfully account with said minor, and pay over all such sums of money as may come to his hands *according to the direction of the court*." Held: on a *scire facias* against the *surety* on this recognizance, that he could not be charged with the money reported to be due by his principal to the ward, by *referees* chosen, without the knowledge or consent of the surety, by the principal and the guardian who succeeded him.

APPEAL from the circuit court of *Dauphin* county, held by Justice *Huston*.

John W. Simonton, the defendant's intestate, entered into a recognizance in the orphan's court of Dauphin county as the surety of *John M'Cord*, who was the guardian of *Peggy Rudy*, on the 11th of September 1820; the condition of which was, "that if the said *John M'Cord*, guardian of *Jonas* and *Peggy Rudy*, should do and perform all things required by law of him as guardian as aforesaid, and shall faithfully account with said minors, and pay over all such sums of money as may have come or shall come to his hands as guardian, *according to the direction of the court*, then, &c." A *scire facias* issued on this recognizance against *Wallace*, the administrator of *Simonton* for the use of *Peggy Rudy*, to December term 1828, to which the defendant pleaded payment; replication, *non solvit*, and issue. On the trial of the cause in the circuit court, the plaintiff gave in evidence the appointment of *John M'Cord* as guardian of *Peggy Rudy*; the decree of the orphan's court directing him to give bail in 1200 dollars; the foregoing recognizance on which suit was brought; the dismissal of the said *John M'Cord*, and the appointment of *Robert M'Clure*; a citation to the said *John* to settle his account; the account filed by him in pursuance of the same, together with the exceptions to its confirmation. The following agreement, report and judgment, with proof of their execution by the subscribing witnesses, were then offered.

"We agree to *William Rutherford*, *James Alrinks* and *James Montgomery* being arbitrators to settle and adjust the account of *John M'Cord*, late guardian of *Peggy Rudy*. The said arbitrators to

[Commonwealth v. Simonton.]

meet at the house of *John Kelker* the 28th of March 1826, with power to adjourn. And the said *John M'Cord* agrees to the prothonotary of the court of common pleas of Dauphin county entering judgment against him for whatever the said arbitrators, or a majority of them may find due from him to the said *Robert M'Clure*, the present guardian of the said *Peggy Rudy*. Witness our hands and seals this 15th day of March 1826.

JOHN M'CORD. [Seal].
ROBERT M'CLURE. [Seal].

Witness present, *William M'Clure.*"

This agreement was indorsed:

" We, the arbitrators within named, having met agreeably to the within rule at the house of *John Kelker*, after being first sworn, and after hearing the parties, their proofs and allegations, do award for the plaintiff 492 dollars and 47 cents, with costs of suit. Witness our hands this 28th day of March 1826."

On which award the prothonotary made this entry: " *Robert M'Clure* guardian of *Peggy Rudy* v. *John M'Cord.* No. 132, April term 1826, amicable action. 30th March 1826, judgment for 492 dollars and 47 cents, with interest from the 28th March instant, and costs (see agreement filed)."

This evidence having been rejected by the court, the plaintiff suffered a nonsuit, and the jury was dismissed.

The plaintiff's counsel then moved to set aside the nonsuit for these reasons. 1st. The court erred in deciding that the plaintiff could not maintain his action, because the orphan's court had not decreed upon the guardianship account of *John M'Cord* before suit brought, whereas such decree was rendered unnecessary, and was revived, by the reference of the said account and the exceptions to it to men, and their report and judgment thereon before suit brought. 2d. That the court erred in deciding, that under the plea in this case the action was not maintainable; whereas the defendant ought to have pleaded, that the decree of the orphan's court on the guardianship account of *John M'Cord* was not made when the suit was brought before pleading in chief to the action.

By the Court: As to the first objection made to the decision of the court, if the guardian had been sued and before the court, I do not decide: it might, as to him, be a waiver of his rights. But when his bail is sued for not paying money in his hands, and the suit is brought before the amount to be paid is ascertained, the case is as strong as those already decided.

The second point is twice decided by the supreme court. Motion overruled, and judgment; from which the plaintiff appealed.

Harris, for the appellant.

In this case, *M'Cord*, the first guardian, had filed an account which he and *M'Clure*, who was last appointed, agreed to refer, and a settlement was made by the man chosen between them, who re-

ported the balance due by *M'Cord* to his ward. The filing of this account in the orphan's court, the reference of it by the consent of the parties, and the adjusting of the balance due by *M'Cord* by the referees, take this case out of the reason of the decisions in *Herr* v. *Bowman*, 1 *Penns. Rep.* 283, and *Denison* v. *Cornwell*, 17 *Serg. & Rawle* 374. Although a guardian has a right to settle his accounts in the orphan's court, yet he may waive that right and appoint a new tribunal. Besides, this is a *scire facias* on a recognizance, the provisions of which are like those of an administration bond; and it has been held that suit may be brought on an administration bond before an account is settled. And where *assumpsit* was brought against an administrator with the will annexed, to recover a distributive share of the residuum of an estate under a will, the amount of which was not ascertained, the proof of an express *assumpsit* was not required. *Holloback* v. *Vanbuskink*, 4 *Dall.* 147; *Clark* v. *Herring*, 5 *Binn.* 40. Again, the objection which is here set up should have been pleaded in abatement, and cannot be taken advantage of under the plea of payment. *Wood* v. *Davidson*, 2 *Rawle* 52.

Elder, contra.

The rule of law ought to be in favour of a surety. By the condition of the recognizance in the orphan's court, *M'Cord* "was to pay over according to the direction of the court;" the reference, therefore, and judgment thereon in the court of common pleas, do not answer the recognizance, and cannot affect the surety, who was not a party to the agreement to refer; nor does the *scire facias* call for him to answer to this *judgment* in the common pleas. A *scire facias* on a sheriff's recognizance must set forth the breaches. *Withrow* v. *The Commonwealth*, 10 *Serg. & Rawle* 231. Here they are not properly set forth; nothing is said of the dismission of *John M'Cord*, nor of the appointment of *Robert M'Clure*, as guardian.

M'Clure, in reply.

The *scire facias* may be amended and new breaches assigned, and even a new declaration filed in lieu of the *scire facias*. The court are not trying a writ of error. The insufficiency of the breaches was not mentioned below; but the court decided on the grounds which are stated in the exceptions.

Per Curiam (Rogers, J. dissenting.)—The *scire facias* itself is an imperfect, and, perhaps, fatally defective statement of the cause of action; but our inquiry has been directed, by the point raised, exclusively to the merits of the case, as it appeared on the evidence. The defendant, being a surety, is not liable beyond the extent of his engagement; in other words, he is not answerable for every thing that happens to be a moral duty of his principal. His engagement here, as appears from the condition of the recognizance set out in the writ, was, that the principal would "do and

perform all the things required by law of him, as guardian, as aforesaid, and shall faithfully account with the said minor, and pay over all such sums of money as may have come to his hands, *according to the direction of the court.*" What, then, was the evidence offered to charge him? It was, that certain arbitrators, chosen by the principal and his successor, had awarded, to be paid by the former, the sum claimed here from his surety. The attempt is to charge him with money ordered to be paid over by his principal, not by the court, according to the condition of the recognizance, but by arbitrators not chosen by the surety. Would that be according to the contract? A surety may well be supposed willing to become liable for what shall be adjudged against his principal by a court of record, without being willing that his principal shall have power to fix him with equal responsibility, by the fiat of arbitrators not chosen by the surety. It is very possible, as suggested, that the orphan's court would have made this award the ground of a decree for payment; but it is equally possible that it would not; and had gross mistake appeared on the part of the arbitrators, it is clear that it would have been bound to refuse its assistance to carry the award into effect. It said, however, that the condition consists of a variety of parts. It does so. But the breach assigned, is the omission to pay over; and though a refusal to do so may seem to be a breach of the condition, which requires him "to do and perform all things required by law," it is an assumption of the very question, to say the law requires him to pay under any other order than the one stipulated. It seems, therefore, the evidence was properly rejected.

Judgment affirmed.

Mehaffy *against* Lytle.

One who attends to the trial of a cause, not as a party, but upon notice by the defendant, because of a liability, the amount of which will be affected by the verdict and judgment, may give evidence to lessen or defeat a recovery; if he neglect to give such evidence, he will not be permitted afterwards to give it in an action directly against himself, by the defendant in the first suit.

When the rules of court require a defendant to give notice to the plaintiff of special matter, which he intends to rely upon as a defence, and such notice is not given, the evidence should be rejected.

An action on a bond of indemnity, given by one to two, when one has alone been damnified, is rightly brought in the name of both the obligees for the use of the one; and declaration is not vitiated by a particular relation of the use, nor by the conclusion that the refusal of the defendant to pay was to the damage of one.

APPEAL from the circuit court of *Lancaster* county, held by Chief Justice *Gibson*.

This was an action of debt on bond, by *James Mehaffy* and *James Duffy* for the use of *James Duffy*, against *Joseph Lytle* who survived *John Pedan;* all the facts of which are fully stated by his honour, who delivered the opinion of the court.

Champneys and *Morris*, for appellants.

Montgomery and *Hopkins*, contra, whom the court declined to hear.

The opinion of the Court was delivered by

KENNEDY, J.—This cause was tried lately at a circuit court held before his honour, the chief justice, for Lancaster county, and has been brought here by an appeal taken on the part of the defendant. It is an action of debt brought on a bond dated the 19th day of July 1815, executed by *John Pedan* as principal, who died before the action was commenced, and *Joseph Lytle*, the defendant, as the surety of *Pedan*, to the plaintiffs, *James Mehaffy* and *James Duffy*, in the sum of 7233 dollars and 41 cents. The bond with its condition, and all the facts and circumstances connected with it, and which have given rise to this suit, are stated and set out in the declaration. From this, it appears, that *John Pedan*, *James Mehaffy*, *James Duffy* and *Henry Share*, as principals, and *Henry Cassel* and *George Snyder* as sureties for *James Mehaffy* and *James Duffy*, and *Joseph Lytle* as surety for *John Pedan*, *Henry Share* giving no surety, all joined in giving a bond, dated the 6th of April 1813, to *Frances Evans*, upon which there remained at the time of giving the bond in suit, a balance due of 14,466 dollars and 86 cents, one-fourth of which was to be paid, as it was then agreed, by *John Pedan*, as his proportion of it; the obligors named in the bond to Mrs *Evans*, being bound to her jointly and severally, for the payment of the 14,466 dollars and 86 cents. The bond in suit was given by *John Pedan*, with *Joseph*

Lytle as his surety, for the purpose of keeping *James Mehaffy* and *James Duffy*, the plaintiffs in this action, indemnified against paying *John Pedan's* one-fourth of the debt due to Mrs *Evans*, and against all damages, costs and charges which might accrue or arise on account of *John Pedan's* failing to pay it. Mrs *Evans* brought a suit upon her bond against *John Pedan*, *James Mehaffy*, *James Duffy*, *Henry Share*, *Henry Cassel*, *George Snyder* and *Joseph Lytle*, in the court of common pleas of Lancaster county, to November term 1815, in which she obtained a judgment on the 26th of January 1816, against all of them, excepting *James Mehaffy*, upon whom the writ of summons was not served, by the direction of Mrs *Evans*, the plaintiff therein, for some cause. The real estate of *Henry Share*, one of the defendants in the judgment, was afterwards taken in execution and sold by the sheriff; and out of the money arising from this sale, the balance due to Mrs *Evans* upon her judgment, being in amount upwards of 9300 dollars, was paid. *Henry Share* being indebted to *Henry Haines*, and knowing that a great deal more than his proportion of the debt due to Mrs *Evans*, had thus been paid out of the proceeds of the sale of his property, assigned to *Henry Haines* the claim which he had for contribution against his co-principal obligors. At this time *John Pedan* had become insolvent, and had failed, as was alleged, to pay any part of his one-fourth of the sum due to Mrs *Evans*, at the date of the bond in suit. *Henry Haines*, therefore, brought a suit to June term 1827, against *James Mehaffy* in the name of *Henry Share*, for his own use, in the district court of Lancaster county, to recover from *Mehaffy* his contributory part of the loss which had accrued through the insolvency of *John Pedan*. This suit, after having been removed into the circuit court, and after notice given by *James Mehaffy* to *Joseph Lytle*, the defendant in this present suit, to appear and defend, who accordingly attended to the trial, was tried, and a verdict and judgment rendered in favour of *Henry Share*, for the use of *Henry Haines*, for 2546 dollars. See this case reported in 2 *Penns. Rep.* 361. *James Mehaffy* paid this sum of money, and brought this action to have it reimbursed to him.

On the trial of this cause the defendant, among other things, offered to give in evidence certain articles of agreement entered into on the 4th of October 1813, between *James Anderson* of the one part, and *Henry Share* of the other part; whereby *Anderson* agreed to sell and convey certain land therein described to *Henry Share* in fee, upon his paying 100,000 dollars. Upon the back of the articles it appeared by indorsements, that *Henry Share* paid on the 15th of October 1813, 11,000 dollars, and again on the 12th of September 1814, 4000 dollars. Also certain other articles of agreement entered into on the 8th of the same October, between *Henry Share* and *James Mehaffy*, *John Pedan*, *Matthias Rouck*, *James Duffy* and *John Haines*, whereby *Henry Share* agreed that each of those persons last named should become equally interested with himself in the purchase of the land set forth in the first articles of agreement, upon their paying each an

equal proportion of the purchase money, which they respectively bound themselves thereby to do; and all further thereby agreed to become partners, and to participate equally in the loss or profit attending the same, as it might happen. And likewise offered to prove further, in connexion with the foregoing articles of agreement, that *James Mehaffy* had received from *Henry Share* his full purpart of the property for which the agreement of purchase was made with *James Anderson*, and that the residue of it was afterwards levied on and sold as the property of *Henry Share* by the sheriff; that subsequently to the purchase of the land from Mrs *Evans*, which formed the consideration of the bond that was given to her on the 6th of April 1813, in which *Pedan*, *Mehaffy* and others were bound as already stated, and to which the bond upon which this suit is founded has a reference, that *John Pedan*, *James Mehaffy* and *James Duffy* laid out the land purchased of Mrs *Evans* into town lots, which were sold by lottery, and *James Mehaffy* appointed treasurer, to receive the moneys arising therefrom, for their joint use; that he received 10,000 dollars, which he applied towards payment of Mrs *Evans's* bond, and thereby obtained his absolute discharge from it. And that on the 15th of August 1818, *Joseph Lytle*, the defendant in this case, paid 1000 dollars to Mrs *Evans* on her bond, as the surety of *John Pedan*. All this evidence so offered to be given was objected to by the plaintiff's counsel, and overruled by the court, and is made the ground of the first, second and third reasons assigned by the defendant for his taking his appeal to this court.

It is very apparent that so far as any part of the evidence thus offered, tended to show that *Henry Share* had received money belonging to *John Pedan*, which he had not accounted for or paid over to him before the commencement of the suit in his name, by *Henry Haines* against *James Mehaffy;* or that *Joseph Lytle* had paid money as the surety of *John Pedan* to Mrs *Evans* upon her bond before that time; it might have been given in evidence by way of defence in that suit: and as *Joseph Lytle* had full notice given to him by *James Mehaffy* of that suit being brought, and that he must defend it; and as it was proved, indeed, by his own witness, General *Porter*, that he did attend to the trial of it; it was incumbent on him to have given that evidence then, if he ever intended to offer it; because, unless given then, it could in no wise relieve *James Mehaffy* afterwards; and this was what *Joseph Lytle* had undertaken by his bond to do. By the express terms of the condition of this bond, he was bound to keep *James Mehaffy* indemnified against the delinquency of *John Pedan;* and if *Pedan's* share of the bond to Mrs *Evans* was paid by *John Pedan* himself, by *Joseph Lytle*, or by any other than *Henry Share*, before it was paid out of the money arising from the sale of his estate, *Joseph Lytle* ought to have shown it on the trial of the suit against *James Mehaffy;* because, by omitting to do so, he made *James Mehaffy* liable, inevitably, to pay it again, and he shall not be permitted to take advantage of his own neglect of duty to prejudice *James*

Mehaffy, contrary to the condition of the bond which is in suit: and beside, *Joseph Lytle* was as much a party to that trial as *James Mehaffy*, and is thereby estopped in like manner to gainsay the correctness of the judgment rendered.

As to the articles of agreement between *James Anderson* and *Henry Share*, and again between *Henry Share* and *John Pedan*, *James Mehaffy* and others, I can not perceive the relevancy or bearing of them in this cause. It was not proposed to prove that *John Pedan* ever paid a cent towards this purchase of *James Anderson*. The only money, amounting to 15,000 dollars, which appeared to have been paid upon it, was paid by *Henry Share*, according to the indorsements entered upon the articles of agreement. This might show that *Henry Share* had some substantial interest in the land which might have been taken in execution and sold for his debts, but could vest no real interest in *John Pedan*, and would not have made it admissible if it had, for the reasons given. And the fact of *James Mehaffy* having got a conveyance for part, was some evidence perhaps of his having paid his proportion of the purchase money; but certainly not any, that *John Pedan* had ever paid any part of his; and therefore could neither give *John Pedan* any real interest in the property, nor form any objection, that I can see, to *Joseph Lytle's* indemnifying *James Mehaffy* according to the tenor of his bond, and the condition thereof. It could not in the slightest degree go to show that *Mehaffy* had either money or property belonging to *John Pedan* in his hands or under his control, out of which he might or could have satisfied the judgment either in part or in whole, obtained against him at the suit of *Henry Share*. And in respect to that part of the offer which related to the sales of the town lots, and the receipt of the moneys arising from them by *James Mehaffy*, it appears to me, in the first place, that it was too indefinite; for if it happened before the giving of the bond in suit, the presumption would be, that so far as *John Pedan* had an interest in it, it was settled for at or before that time; for *Mehaffy* could not with any propriety have asked *John Pedan* for an indemnity against the payment of his proportion of Mrs *Evans's* bond when he had funds of *Pedan* in his own hands, with which he could do it; nor can it be believed that *John Pedan* under such circumstances would have given this bond of indemnity. But if it were intended to show that *James Mehaffy* had received such moneys after the giving of the bond in suit, then, I think, as the receipt of their moneys had no connexion with the object of the bond in suit, and as it was not proposed to prove that *James Mehaffy* had any directiom from *John Pedan* to apply his portion of the money so received to the payment of his proportion of the sum due on Mrs *Evans's* bond, it might have taken the plaintiffs by surprise, and have done them great injustice to have admitted the evidence without the defendant's having given a previous notice in writing of his intention to do so on the trial of the cause; for had such notice been given to *James Mehaffy*, he might

have been prepared possibly to have shown that all the money so received by him had been accounted for, and applied otherwise by the direction of *John Pedan.* I therefore think that the chief justice was clearly right in overruling this part of the evidence offered, because previous notice in writing had not been given, according to the rule of court on the subject. And if *James. Mehaffy* obtained any discharge from Mrs *Evans* that could have discharged him from the suit which *Haines* brought in the name of *Henry Share* against him, it was not pretended that he concealed it from the defendant in this action or from any of his co-obligors named in the bond to Mrs *Evans*, or that it was not known to *Joseph Lytle* on the trial of the cause by *Share* against *Mehaffy*, as well as it is now; and that was the time to have set it up as a defence in order to indemnify *Mehaffy;* but if the discharge was not such as would have discharged *James Mehaffy* from the claim of *Henry Share*, after Mrs *Evans* had obtained a judgment against *Share* and all his joint co-obligors, including the defendant himself in this action, with the exemption of *Mehaffy*, on whom the writ was not served, and who does not appear to have known any thing about the suit and the judgment had in it—and I confess that I am at a loss to conceive what kind of a discharge it must have been to have had such an effect—it could avail nothing in either suit, and was therefore inadmissible.

These remarks are sufficient to dispose of the three first reasons; and the fourth remains now to be considered, which is, as I understand it, an objection to the plaintiffs' declaration, that it does not set forth such a cause of action as shows that the plaintiffs are entitled to recover in this case.

It is first objected, that it declares the suit is "*for the use of James Mehaffy, so far as relates to his interest in the bond.*" And that after setting out the bond and its condition, as also the bond given to Mrs *Evans*, which is referred to in the bond on which the declaration is drawn, together with the suit and judgment had upon it, and the payment of the same out of the moneys arising from the sale of *Henry Share's* property; and again, the suit and judgment had, in consequence thereof, against *James Mehaffy* at the suit of *Henry Share*, for the use of *Henry Haines;* the plaintiffs say, "by reason of which premises the said *James* hath sustained large damages, to wit, to the amount, &c.," and superadd, "by reason of which breaches the said writing obligatory became forfeited, and action hath accrued *to them, the said James Mehaffy and James Duffy*, who sue for the use of the said *James Mehaffy, so far as relates to his interest on the said bond of indemnity*, to have and demand from the said *Joseph Lytle*, who survived the said *John Pedan*, the said sum of 7233 dollars and 41 cents; yet the said *Joseph Lytle*, although often requested, &c., hath not paid, &c., to the *damage of them, said James Mehaffy, and James Duffy*, 7233 dollars and 41 cents, and therefore they bring their suit, &c." Now, although there may be some useless and unnecessary verbiage introduced into this declaration, yet, I apprehend, that it

contains every thing that is necessary, when proved, to entitle the plaintiffs to a recovery. *Utile per inutile non vitiatur*, is the maxim of law in respect to this. The bond upon which this suit is founded, is joint in its terms to *James Mehaffy* and *James Duffy*. Although the suit is stated to be for the use of *James Mehaffy*, yet it is legally, and technically, and properly too; a joint action by them both against *Joseph Lytle*. To enable the plaintiffs to maintain their action on this bond, it was not necessary that they should have been compelled to pay more on account of the delinquency of *John Pedan*, out of their *joint* funds; nor that they, or either of them, should have paid it on a proceeding or judgment had against them *jointly*. The terms of the condition of the bond are such as to show, beyond a doubt, that it was given for the purpose of protecting both or either of the joint obligees. The words are, "keep harmless, and indemnify the said *James Mehaffy* and *James Duffy*, their heirs, executors and administrators, and *his* and *their* goods and chattels, lands and tenements, &c." Hence a payment of money made by either *James Mehaffy* or *James Duffy*, by reason of *John Pedan's* having failed to pay his proportion of the debt due to Mrs *Evans*, would create a forfeiture of the bond in suit, and enable the obligees to maintain a joint action; and in no other form, perhaps, could it be maintained, as the bond is joint; but still it would be necessary to set forth and state the breach according to the truth of the facts, as appears to have been done in this case, judging from the evidence that was given on the trial of the cause. The facts set forth in this declaration show most clearly a forfeiture of the bond, and a right upon the part of the plaintiffs to maintain this action. If the words declaring it to be for the use of *James Mehaffy* had been omitted, the breach assigned shows unquestionably that he is the party really injured by it, and the recovery would, by operation of law, necessarily result to his use; and surely, it would be most strange indeed if it could be made error to declare a suit for the same use which the law, from the facts set forth, would necessarily imply it.

The conclusion of the plaintiffs set forth in their declaration, immediately after the assignment of the breach of the condition of the bond, in these words, "by means of which premises the said *James* hath sustained large damages, to wit 7233 dollars and 41 cents," has been excepted to, and pressed, seemingly with great earnestness; but there is nothing in it incompatible with the forfeiture of the bond as previously set forth, nor yet with the right of the plaintiffs to maintain this action. Neither do I think, that there is any weight in the objection made to the declaration on account of the following words, "*so far as relates to his interest* (meaning *Mehaffy*), *in the said bond of indemnity*, &c.," which are introduced in several places, with a view, as is alleged, of reserving the right of *James Duffy* to maintain another suit upon this same bond for his use. I do not believe that a reservation, made in the most unambiguous

terms that could be imagined to that effect, would avail any thing more than if every thing of the kind were omitted; so that it can work no injury to the defendant, and is therefore not to be regarded as having any effect whatever.

We think that the judgment of the circuit court is right.

Judgment affirmed.

Wetherill *against* Keim.

In a proceeding in partition by one plaintiff against several defendants, the inquest must set out in severalty, not only the part of the plaintiff but of each of the defendants; and if the land can not be divided so as to accommodate each severalty, it must be valued; without such valuation the inquisition is irregular.

ERROR to the common pleas of *Schuylkill* county.

This was an action of partition by *John M. Keim* against *Samuel P. Wetherill*, *John P. Wetherill*, *Charles Wetherill*, *William Wetherill*, and *Rebecca Gumbes*, to have partition of several tracts of land, adjoining each other, containing four hundred acres. Judgment *quod partitio fiat*, was entered, and a writ *de partitione facienda* was issued. The jury of inquest divided the lands into two parts by metes and bounds, and allotted one part to the plaintiff *John M. Keim*, and allotted the other part to all the defendants, having found that it would not divide without injury to the whole. The jury did not put a valuation upon either part. The court below were asked to set aside the inquisition for these reasons.

1. The jury did not divide the land into six parts.

2. The jury did not appraise the parts into which they divided the land, pursuant to the act of 11th of April 1799.

3. The court erred in rendering the judgment *quod partitio fiat*, because the writ and declaration of the plaintiff did not embrace all the lands held by the plaintiff and defendants, as tenants in common in the county of Schuylkill.

The court refused to set aside the inquisition on any of these grounds; and this writ of error was sued out, and the same errors were assigned here.

Parry and *Leoser*, for plaintiffs in error, cited *Statute* 31 *Hen.* 8, *ch.* 31; 32 *Hen.* 8, *ch.* 32; *Rob. Dig.* 217, 224; 1 *Th. Co. Lit.* 806; 2 *Cruise's Dig. tit. Joint Tenant* 507; *Ibid.* 538; 2 *Black. Com.* 189; 1 *Penns. Black.* 477; 2 *Com. Dig.* 732; 8 *Com. Dig. App. to Chan. title Partition* 825; *Acts of Assembly of* 11*th of April* 1799; 7*th of April* 1807; 5*th of February* 1821; *Rex* v. *Rex*, 3 *Serg. & Rawle* 536; *Yelbach's Appeal*, 8 *Serg. & Rawle* 207; *Young* v. *Bichel*, 1 *Serg. & Rawle* 468.

Biddle, for defendant in error, cited, 3 *Chit. Pl.* 671; 3 *Johns. Cha. Rep.* 202; 1 *Johns. Cha. Rep.* 271.

The opinion of the Court was delivered by

Rogers, J.—At common law, on a writ of partition, the court examined the title, and quantity of the purparts of the plaintiff, and the inquest set out in severalty, by metes and bounds, his share alone; but, by the act of the 5th of February 1821 (*Purd. Dig.* 685), entitled a supplement to the several acts of this commonwealth, the legislature have declared, "that in all cases, when a writ of partition hath been, or may be issued, by any of the courts of this commonwealth, having jurisdiction thereof, at the suit of one joint-tenant, co-partner or tenant in common, against two or more defendants, and notice thereof is made, or given in conformity with law, the court from which the said writ hath issued, or may issue, shall, upon the appearance of the parties, or on default being made, proceed to examine the title and quantity of the parts or purparts of the respective defendants, as well as of the plaintiffs; and accordingly as they shall find the said titles and quantity of the parts or purparts to be, they shall give judgment, and award a writ to make partition, whereby such purparts shall be set out in severalty, and the like proceedings, as to judgment and in all other respects, shall and may take place and be had, as are now required or authorized when the purpart of the plaintiff is alone set out in severalty; provided always, that if all the said defendants shall, on or before the return day of the said writ, by writing filed in the said court, declare their wish that their interest in the premises, whereof the plaintiff seeks partition, may remain undivided, then and in such case, the plaintiff's purpart shall alone be set out, any thing herein to the contrary notwithstanding."

John M. Keim issued a summons in partition against the several defendants named; and the court of common pleas, on the 4th of January 1832, gave judgment *quod partitio fiat.* On the 5th of January 1833, the court adjudged that the purparts of the defendants, being one-tenth of the whole for each of the defendants, be set out in severalty, as well as the moiety adjudged to the plaintiff. It appears on the record that the defendants, instead of declaring their wish that their interest in the premises should remain undivided, had a judgment entered by the court, in due form, by which it became the duty of the inquest to set out in severalty their respective interests, as well as the interest of the plaintiff. It became, then, necessary for the inquest to inquire, whether the premises would admit of division into six parts; the one-half to be allotted to the plaintiff, and the one-tenth to each of the defendants. The inquest have set out, by metes and bounds, the one-half of the property to *John M. Keim*, in severalty; and have returned that they cannot divide and apportion the other moiety among the several respective defendants. This is in effect a return by the inquest, that the property would not admit of division into six parts, according to the judgment. It be-

came then, the duty of the inquest to inquire, and return, whether the lands and tenements could be divided according to the command of the writ, without prejudice to or spoiling the whole; and if it would not admit of division, to make and return to the court a just valuation and appraisement of the lands and tenements; so that such proceedings might be had thereon, as is directed by the act concerning writs of partition, passed the 11th of April 1799, to which the act of 1821 is a supplement. That a valuation must be made when the lands cannot be divided is apparent, from the act of the 5th of February 1821, which prescribes, that in cases where there are two defendants, the court shall give judgment, and accord a writ of partition, whereby such purparts shall be set out in severalty, and the like proceedings, as to judgment and in all other respects, shall and may take place, and be had, as are now required, or authorized, where the purpart of the plaintiff is alone set out in severalty. The object of the act of 1821 is to avoid the expense and trouble which attend the execution of several writs of partition; and that the parts of all should be set out in severalty by the same inquest, and at the same time. A different construction of the act would defeat the intention of the legislature. We are of the opinion, that the proceedings are not in accordance with the judgment of the court, and the several acts of assembly; and that the inquest and proceedings therein should be set aside.

Proceedings set aside.

Duncan *against* Duncan.

Whether an instrument of writing be under seal or not, is a question of law to be solved by the court from the inspection of the paper itself.

An horizontal slit in the parchment upon which a conveyance is written, with a ribbon drawn through it opposite the name of the justice before whom the acknowledgement was made, is not a sufficient seal to constitute a deed.

The acts of assembly of the 28th of May 1715, 24th of February 1770, 18th of March 1775, and the 18th of March 1814, providing a mode for taking the acknowledgement of deeds by justices, aldermen and judges, are all *in pari materia;* and their construction requires that the acknowledgement taken by any of these officers should be certified under their hand and seal, in order to justify the recording of the deed, or make it admissible in evidence without the common law proof of its execution.

APPEAL from the circuit court of *Dauphin* county, held by Justice *Rogers*.

This was an action of ejectment for an island at the junction of the Susquehanna and Juniata rivers, by *Stephen Duncan* against *Rebecca Duncan*.

The plaintiff, in order to support his title, gave in evidence the

will of the honourable *Thomas Duncan*, containing this clause: "my island, bought of *John Reed*, at the mouth of the Juniata, I desire to be appraised by three persons, to be selected by my executors, and if my son *Stephen* will accept the same at the valuation, then it is to be conveyed to him in fee simple, he securing the purchase money by mortgage on the premises, which purchase money is to be considered as part of my estate; if he refuses to take it, then it is to be sold by my executors." He then gave in evidence, the appointment of the appraisers; their valuation of the property; and his acceptance of the same at the valuation; and then offered in evidence a conveyance from *Martha Duncan*, executrix, *Edward J. Stiles* and *John D. Mahon*, executors of *Thomas Duncan*, esquire, deceased, to *Stephen Duncan*. This conveyance was signed by the grantors, and opposite the name of each, there was an horizontal slit in the parchment on which it was written, and a blue ribbon was drawn through, extending along all the names. The acknowledgement by *John D. Mahon* and *Edward J. Stiles*, was made before a justice of the peace, and that of *Martha Duncan* was made before the *Chief Justice*, and the certificate of each, in the body of it, purported to be under their hands and seals, but the seals were such as those opposite the names of the grantors. The ribbon was not attached to the parchment otherwise than that it passed through the slits in the parchment.

The defendant objected to this conveyance, on the ground that it was not sealed and that the certificate of the justice of the peace and that of the chief justice were not under seal. These objections were sustained by the court, and the plaintiff took a nonsuit, which he afterwards moved the court to take off, and assigned these reasons:

1. The court erred in rejecting the conveyance offered in evidence.
2. The plaintiff should have been permitted to maintain his action upon the evidence given, without the conveyance.

The court overruled the motion, and the defendant appealed. The same reasons were assigned in this court.

Attorney-General *Lewis*, *Foster* and *Weidman*, for appellants, cited, the acts of assembly of the 28th of May 1715, 24th of February 1770, 18th of March 1775, and 18th of March 1814, and contended that the act of the 28th of May 1715, was the only one which required that the certificate should be under the seal of the justice. Upon the passage of this act, a justice of the peace was the only officer who had power to take the acknowledgement of a deed; but when that power was extended to judges, and subsequently to aldermen, the acts of assembly do not require that the certificate should be under seal; it was a mere matter of form, which the legislature deemed proper to dispense with. And that a seal is not necessary to the validity of an acknowledgement by a judge, is settled by the case of *Whitmire* v. *Napier*, 4 *Serg. & Rawle* 290.

But these certificates *were* sealed. In Pennsylvania, a seal need

not be composed of wax, or ink, or any other material; if the intention of the party to affix a seal to his name manifestly appears, it is all the law requires. On this point were cited, 1 *Dall.* 63; 6 *Mod.* 45; 1 *Wash. C. C. Rep.* 42; 2 *Caines's Rep.* 362. The plaintiff's counsel also contended, that whether the certificates were sealed or not, was a matter of fact which should have been referred to the jury to determine. The plaintiff should have been permitted to maintain his action upon the evidence given: the devise was proved; the appraisement was made; and he had accepted; so that every thing was done to entitle him to a conveyance, which a court of chancery would have compelled the executor to make; and if so, he could recover, in ejectment, without a conveyance.

Watts and *M'Clure*, for appellees.

A seal is essential to the validity of a deed. *Jackson* v. *Wood*, 12 *Johns. Rep.* 72; *Warren* v. *Lynch*, 5 *Johns. Rep.* 239; *Holliday* v. *Marshall*, 7 *Johns. Rep.* 211; 2 *Black. Comm.* 227, 312; *Wood's Conv.* 125, *Powel's Ed.*; *Co. Litt.* 35; 4 *Kent's Comm.* 450. So long as there remains a distinction in the forms of action, it will be necessary to maintain a broad line of difference between that which is a sealed instrument, and that which is not. The courts have gone very far, in Pennsylvania, to give a flourish with a pen the character of a seal; but, to go further, would be to lose sight of what was or was not a seal. 5 *Binn.* 241. The certificates were not under the seals of the officers. It is essential that a seal be so permanent and durable, that no difficulty can arise in determining whether the instrument be sealed or not. It must be tried by inspection, and by the court. The slit in the parchment cannot be called a seal; the riband seen through it cannot be so called; nor can both together; for although together now, they may not be so long. A recorder would be authorized to put the deed on record, if the riband and slit made a seal; but if the riband should fall out, he would not.

The plaintiff's second point was not made in the court below; he did not offer to let his cause go to the jury, upon the evidence given, without the conveyance. But if he had, he could not have recovered. Conditions annexed to the exercise of a power, must be complied with strictly, however unessential they may be: the person creating the power may impose what checks he pleases. If a deed be required, it cannot be executed by will. 4 *Kent's Comm.* 330. The will directs that a *conveyance* shall be made to the plaintiff; and this is the language of one who well knew the meaning of technical terms.

The opinion of the Court was delivered by

Kennedy, J.—This is an appeal from the decision of the circuit court, lately held at Harrisburgh, for Dauphin county. On the trial of the cause before his honour, Mr Justice *Rogers*, the plaintiff offered to read in evidence an instrument of writing, purporting to be a con-

veyance from *Martha Duncan*, executrix, *Edward J. Stiles* and *John D. Mahon*, executors of the last will of the late Hon. *Thomas Duncan*, deceased, to *Stephen Duncan*, the plaintiff: which was objected to by the counsel of the defendants, because the certificate of the acknowledgement of the execution thereof, by *Martha Duncan*, which appeared to have been taken by the chief justice of this court, and the certificate of the like acknowledgement of *Edward J. Stiles* and *John D. Mahon*, the other grantors, which appeared to have been taken by *Archibald Ramsay*, stating himself, in the body of the certificate, to be a judge of the court of common pleas of Cumberland county, in this state, but who was, in fact, only a justice of the peace of that county, were given by these officers, respectively, under their hands merely, without being under their seals.

Two questions have been raised upon the argument. First, Whether, in point of fact, a seal is not affixed to each of the certificates? And second, If not, whether it be requisite, under our recording acts, that such certificate should be given under the *seal* of the officer taking the acknowledgement?

The body of the conveyance, and the certificates, appeared all to have been drawn in the same handwriting. The conveyance is written on parchment, in the margin of which, at the end of the name of each of the grantors, and of the officers respectively subscribed to the certificates of acknowledgement, incisions or slits are made, in an horizontal direction, apparently with a knife, and a blue riband weaved through them by the scrivener, who, no doubt, intended that the riband, which covered about five-eighths of an inch square of the parchment, at the end of each name, should, at the time of signing, have been been covered with a seal of wax, and by means thereof, have been attached to or incorporated with the parchment, which was neglected. In the conclusion of the conveyance, the words, "we have set our hands and affixed our seals" are inserted; and likewise in each of the certificates, it is stated to have been given "under my hand and seal," but no scroll, wax, wafer, or any thing more than the riband is used, as already mentioned, to denote a seal affixed to any of the signatures.

It has been contended that the riband inserted in the parchment, in the manner described, was sufficient in law to constitute a seal, if so intended by the party; and that it ought, therefore, to have been received in evidence, and submitted to the jury as a matter of fact to be decided on by them, whether the riband was used with that intent or not.

This argument may be ingenious, and, at first view, somewhat plausible; but a moment's reflection will show, as it appears to me, that it is not solid, and cannot answer the design of the law in regard to seals. I apprehend that whether an instrument of writing be under seal or not, is a question of law to be solved by the court from the inspection of the instrument itself. It is highly important to the interests of society, that every man should be able to determine with

certainty upon looking at an instrument of writing, whether, if genuine, it is a deed or not, that is, whether it has what the law denominates a *seal* affixed to it or not; but it must be obvious that unless the true character of a seal is fixed by the law, which is uniform and certain, and may be known by every one, it will be oftentimes impossible to determine whether an instrument of writing is a deed or not. If parties are permitted to substitute any mark or device which their imagination may suggest for a seal, and it is to be made a question of fact to be decided by a jury whether it was so intended or not; it will not only introduce great confusion and uncertainty, but a principle which cannot be carried into effect without repealing some of the provisions of our statutes providing for the recording of deeds.

Every recorder of deeds and conveyances of land within the state, is bound to make a true and faithful record of all such as shall be handed to him for that purpose, after that they have been duly acknowledged or proved; but if the law is not to determine what shall constitute a seal—which is the distinguishing characteristic of a deed from other instruments of writings—without the intervention of a jury, how is the recorder to decide whether he shall record it as a deed or not? that is, with the seal of the party affixed to it or without it? It is obvious that unless the question, What shall be considered a seal? be referred to the law, to be settled by some fixed rule determining its precise character; that every recorder of deeds must be left to decide the matter according to what he might conjecture was the intention of the party or parties. It could, at most, be only conjecture, for he must necessarily decide without evidence, as he has no means of obtaining it; which would be productive of confusion and uncertainty. The same conveyance, for instance, includes several tracts of land, lying in different counties of this state, and the grantee, for his greater security, has it recorded in each of the several counties; but the recorders entertaining different opinions in regard to its being a sealed instrument or not, some of them record it with a seal, and others record it without a seal. By some means the original happens to be lost, in which case the record must be resorted to, as the only existing evidence; but upon recourse being had to it, and it appearing to be without a seal of the grantor affixed to it, a grave question then arises, whether any title in the land has been transferred by it, inasmuch as it is not a deed? Again, an exemplification of it, with a seal affixed to the name of the grantor, is produced from another county, which by our recording acts is made evidence of as high a nature as the original itself; which presents another question between these conflicting records, Which of them shall prevail? And in the last place, I would ask, how the rule that is contended for here, that a jury shall decide whether a seal has been affixed or not, can be carried into effect, when an exemplification only is produced, and which will be produced in all cases where it is conceived that it will answer the purpose of the party better than the original,

because, by the express terms of the recording act of 1715, it is made equally good and available evidence as the original? It is easy to perceive that without the production of the original, it would be utterly impracticable in many cases to have the question of seal or no seal decided by the jury. Hence, confusion, uncertainty and impracticability would all seem to be the consequences of attempting to carry such a principle into operation. Happily, however, the law is well settled otherwise. It has defined precisely what the seal of a party to a deed shall be or consist of.

An impression upon wax or something of the kind, or the wax itself, was the only kind of seal known to the common law of that country, whence we have derived our common law. 2 *Bl. Com.* 309, 310. In addition to this, we have, by immemorial use and custom, adopted as a seal a scroll made with ink. It is in such general use that there are but few, I think, who are not intimately acquainted with its character and appearance, and therefore well suited to become part of our law on this subject; and to support the decisions recognizing it as such in *M'Dill and Lee* v. *M'Dill*, 1 *Dall.* 63, and *Long* v. *Ramsay*, 1 *Serg. & Rawle* 72. In using even a scroll for a seal, it would seem to be proper, or at least prudent, not to depart from the common form which is generally used in making it, so that no possible doubt may be raised of its having been intended for a seal; for, according to the principles laid down in *Taylor* v. *Glaser*, 2 *Serg. & Rawle* 502, unless a seal, such as is known to and recognized by the law, be affixed to the name of the party, it will not be considered a deed, although some other device may be substituted for a seal, and the words "in witness whereof I have hereunto set my hand and affixed *my seal*," may be used in the attestation. It is said by the late Chief Justice, in that case, that without the seal, these words will not make a deed, though the seal will make it such without the words; which goes to show the importance and necessity of the seal being something that is known to every one to be used for that purpose. In Virginia it was thought that the common law had defined what should be a seal with so much precision and certainty, that the legislature deemed it necessary to pass a statute to authorize a scroll to be used for that purpose. See 2 *Tuck. Bl.* 306, in note.

We are therefore decidedly of opinion that it belonged to the court to determine in this case, by an inspection of the certificates of acknowledgement, whether they were given under the seals of the respective officers or not, and that it was correct in deciding that they were not under seal.

I come now to the consideration of the next question: which is, Was it necessary that the certificates should have been given under seal, in order to make the conveyance admissible in evidence, according to the provisions of our acts of assembly on this subject?

The first act, and the only one which directs the manner in which the acknowledgements or probates of deeds and conveyances shall

be certified, was passed on the 28th of May 1715, and is entitled "an act for acknowledging and recording of deeds." This act, after empowering justices of the peace of the proper county or city where the lands lie to take the acknowledgement of the grantor named in the deed and conveyance, or in case he be dead or can not appear, then to receive proof of the execution thereof from two or more of the witnesses who were present at the time, directs in the third section thereof, that the justice taking the acknowledgement on proof shall thereupon "under his hand and *seal* certify such acknowledgement on proof, &c.," which after being done, the deed may, according to other provisions of the act, be enrolled in the recorder's office of the county where the lands lie: and this being done, it is enacted by the fifth section, that "the copies or exemplifications of all deeds so enrolled, being examined by the recorder and certified under the seal of the proper officer (which the recorder or keeper thereof is thereby required to affix thereto), shall be allowed in all courts where produced, and are thereby declared and enacted to be as good evidence, and as valid and effectual in law as the original deeds themselves, or as bargains and sales enrolled in the said courts of Westminster Hall (which courts are mentioned in a preceding part of the section for another purpose), and copies thereof can be, and the same may be showed, pleaded, and made use of accordingly." This act has ever been considered as authorizing, by necessary implication, the original deed, after it has been acknowledged or proved in conformity to its directions, to be given in evidence on the trial of a cause where it may be relevant, without other proof being offered of its execution; and it has been adjudged admissible without being recorded. *M'Dell and Lee* v. *M'Dell*, 1 *Dall.* 63, and *Hamilton and Lee* v. *Gallaway*, *Ibid.* 93.

From the express terms of this act, the certificate of the acknowledgement or probate must be under the hand and *seal* of the justice. At common law such acknowledgement or probate would not have entitled the deed to be given in evidence, and it is only by means of this statute that it becomes admissible; which renders it indispensably necessary that the requirements of it should be fully observed and complied with, otherwise the deed can only be admitted after evidence has been given of its execution, according to the rules of the common law.

By the act of the 24th of February 1770, entitled "an act for the better confirmation of the estates of persons holding or claiming under *femes covert*, and for establishing a mode by which husband and wife might thereafter convey their estates" (*Purdon's Dig.* 196), the judges of the supreme court or any justice of the county court of common pleas of the county where the lands lie, are authorized to take the acknowledgement of deeds conveying lands by husband and wife, and to certify the same. Again, by the act of the 18th of March 1775, entitled "a supplement to the first act" (*Purdon's Dig.* 198), power is given to the judges of the supreme court and the justices of the common pleas of the

county where the lands lie to take the acknowledgement of all deeds and conveyances, or proof by one or more of the subscribing witnesses to them. So other acts since these have been passed, which are still in force, extending this power to other officers therein named; among which is one passed the 18th of March 1814, giving aldermen and justices of the peace of this commonwealth power to take the acknowledgement or proof of all deeds, conveyances, mortgages or other instruments of writing touching or concerning lands, tenements or hereditaments lying in any part of the state; giving to them the same power in this respect that had been previously given to the judges of the supreme court. But in all the acts passed on this subject since the first act of 1715, not a word is to be found directing or pointing out the manner in which the acknowledgements and probates so authorized to be taken shall be certified. Neither is there any thing tending in the least to show that the legislature, by any of these subsequent acts, intended or ever thought of dispensing with the seal of the officer that is expressly required by the terms of the first act to be affixed by him to his certificate of the acknowledgement or probate. These acts are all *in pari materia*, and must be construed as one act; the direction therefore contained in the first, that the certificate of the officer shall be under his hand and seal, must be considered as running throughout the whole, and prescribing the same mode for certifying acknowledgements or probates taken within the state by any of the officers to whom such authority has been given by these acts of assembly. I am aware that there is a very short note of a case, *Whitmire* v. *Napier*, 4 *Serg. & Rawle* 290, which seems to militate against this construction. It does not appear, however, that the point was argued, nor how the court came to the conclusion that is there mentioned; and I am strongly inclined to believe that it was done without argument, and without a full examination of all the acts of assembly on the subject: by them we are bound, and must make our decision accordingly; and after a careful examination of them all, I am convinced, beyond the shadow of a doubt, that whether the acknowledgement or probate be made before a judge of the supreme court, president or assistant judge of the common pleas, alderman or justice of the peace, within this state, it must be certified under his *hand and seal*, otherwise the deed or instrument can not be admitted in evidence, without other proof of its execution.

The decision of the circuit court is affirmed.

Mercer *against* Watson.

A husband and wife conveyed the estate of the wife by a deed defectively acknowledged, and after the death of the wife, the heirs at law brought an ejectment and recovered the land, and remained in possession of it for seventeen years, and until after the passage of the act of assembly, entitled "an act for the better confirmation of the estates of persons holding or claiming under *femes covert*, and for establishing a mode in which husband and wife may hereafter convey their estates." It was held: that this act cured the defect in the acknowledgement, so as to enable those who claimed under the deed, to bring an action of ejectment and recover back the land.

Nothing short of an actual, continued, visible, notorious, distinct and hostile possession of land for twenty-one years, will enable a defendant to avail himself of the statute of limitations. And if his possession be obtained by virtue of a writ of *habere facias possessionem*, the twenty-one years will commence to run from the execution of that writ, and not from the date of the demise laid in the declaration in the action wherein that issued.

An action of ejectment was brought, and a verdict and judgment for the plaintiff; an ejectment was then brought by the defendant in the first action, and a verdict and judgment for him, which was reversed by the supreme court; in another ejectment by the plaintiff in the second, it was held, that the verdict and judgment in the first, and reversal of the judgment in the second, were not a bar to the third ejectment.

An ejectment was brought against several defendants, some of whom were minors at the institution of the suit, but before the return day of the writ, a guardian was appointed for them, who employed counsel to defend, and who did defend. Held, that a verdict and judgment against all the defendants was good.

APPEAL from the circuit court of *Lancaster* county, held by Chief Justice *Gibson*.

This was an action of ejectment for two tracts of land, by *John Mercer*, surviving executor of *James Mercer* deceased: against *Jane Watson; David Watson* and *Esther Watson, Ann Watson, Samuel P. Watson* and *Jane J. Watson*, by their guardian *Jane Watson*. Both parties claimed title under *Samuel Patterson* deceased, who died intestate, leaving issue five children, *John, Margaret, Samuel, Joseph* and *Sarah*. In 1784, by proceedings in partition, the land was confirmed to *James Mercer* and *Margaret* his wife, in right of the said *Margaret*, who was one of the heirs of *Samuel Patterson* deceased. On the 30th of May 1785, *James Mercer* and *Margaret* his wife conveyed to *Nathan Thompson*, who, by deed of the same date, reconveyed to *James Mercer*. The will of *James Mercer*, proved the 10th of December 1804, vested his title in the plaintiff, *John Mercer*, his executor.

Sarah Patterson, one of the daughters of *Samuel Patterson*, deceased, was married to *David Watson*, and died, leaving issue one son, *Samuel Watson*, who also died, leaving the defendants, his widow and children. The defendants gave in evidence, the record of an action of ejectment for the land in dispute, brought to February term 1802, by the lessee of *David Watson* and wife, against

[Mercer v. Watson.]

James Mercer, demise laid on the 1st of February 1802, ouster the same day, which abated by the death of *James Mercer* in 1804. Another ejectment for the same land to February term 1805, by the same plaintiff, against the same defendant; demise laid in 1804, verdict and judgment for the plaintiff, removed to the supreme court, and the judgment affirmed in 1808. Ejectment to January term 1818, by *John* and *Margaret Mercer* against *Samuel P. Watson*, for the same land, and the respective parties claimed under the same title as the parties in the former ejectment; verdict and judgment for the plaintiffs, removed by writ of error to the supreme court, and the judgment reversed. Also, to August term 1809, record of an action for mesne profits, by *Watson* and wife against *Bailey* and others; verdict and judgment in 1813, for 1200 dollars damages.

Upon the judgment in ejectment, by *Watson* and wife against *Mercer*, brought to February term 1805, an *habere facias possessionem* issued to March term 1809, and the plaintiffs were then put into possession.

The present action of ejectment was brought to June term 1829, the *præcipe* dated the 6th of May 1829. All these ejectments arose out of the defective acknowledgement by the wife, of the deed from *James Mercer* and *Margaret* his wife, to *Nathan Thompson*. And this ejectment was brought in consequence of the passage of the act of the 3d of April 1826, confirming deeds by *femes covert*.

After the testimony was closed, the counsel for the defendants prayed the court to charge the jury on the following points of law, and to file their charge of record.

1. That on the death of *Margaret Mercer*, the wife of *James Mercer*, seised in fee of the lands in dispute in this cause, intestate, her husband, continuing to hold and possess them after her death and claiming to devise them as his own, was a tenant at sufferance, and his continuing in possession of them was not adverse or hostile to the true owners or the heirs at law of his wife.

2. That upon the death of *Margaret Mercer*, intestate and without issue, and the ejectment sued on the 4th day of February 1802, by her sister, *Sarah Watson*, her sole heir at law, and *David Watson*, her husband, against *James Mercer*, for the recovery of the real estate, of which the said *Margaret Mercer* died seised in fee, and which the said *James* held and withheld from her heir at law the said *Sarah*, the said *James Mercer* became a tort feasor and trespasser from the time he withheld the said fee simple estate from the said *Sarah* and her husband, and became responsible to them for damages for so withholding the said estate from the said *David Watson* and wife, in the right of the said *Sarah*, from the death of the said *Margaret Mercer*, and the descent cast, unless the plaintiff can show other title for so withholding and retaining the said possession, than that of the deeds of 30th of May 1785, by *James Mercer* and *Margaret* his wife to *Nathan Thompson*, and from said *Thompson* to *James Mercer*, given in evidence in this cause.

3. That the alleged deed of 30th of May 1785, executed by *James Mercer* and *Margaret* his wife to *Nathan Thompson*, not being executed and acknowledged conformably to the act of assembly, passed the 24th of February 1770, "establishing a mode by which husband and wife may hereafter convey the estate of the wife," was, at the time of its execution and acknowledgement, no deed in law, but an absolute nullity, so far as it pretended to convey, or in any way affect the real estate of the said *Margaret* contained in it.

4. That as *John Mercer*, the present plaintiff, and the other defendants in the ejectment sued against them on the 4th of February 1805, in the common pleas of Lancaster county, for the recovery of the lands now in dispute in this ejectment, by *David Watson* and *Sarah* his wife, gave in evidence the deed of the 30th of May 1785, given in evidence in this cause, and insisted on it on the trial and appeal taken in that cause to be a bar to the said ejectment, by vesting the estate in *Nathan Thompson*, which his conveyance, given in evidence, vested in *James Mercer*, and tolled and defeated the descent of the said estate to *Sarah Watson*, on which points so raised and filed of record by the defendants, the supreme court, on the 31st of December 1808, decided, that the said deeds did not bar the said ejectment, and that the plaintiffs, as heirs at law, do recover the real estate of the said *Margaret* from the said defendants, which judgment given in evidence in this cause, is conclusive evidence that the said deed of the 30th of May 1785, was absolutely void, as the deed of the said *Margaret Mercer*, to convey her estate, or to prevent the descent thereof to her heir at law, the said *Sarah Watson*.

5. That it appears from the record given in evidence in this cause, that the lessee of *David Watson* and *Sarah* his wife, after the recovery stated in the fourth point above, on the day of 1809, brought an action of trespass for the mesne profits against the said *John Mercer* the present plaintiff, *Francis Bailey*, *John Messencope*, and *Joseph Lefevre*, to August term 1809, No. 1, in the common pleas of Lancaster county, in which they recovered by a verdict of a jury, and the judgment of the court, 1200 dollars, showing that their possession of the lands so recovered, and the profits received was wrongful, and themselves trespassers in occupying the lands so recovered under the deed and will shown in evidence in this cause by the plaintiff.

6. That the said *Sarah Watson* died intestate, and her real estate, the lands now in dispute, descended to *Samuel P. Watson*, her only child and heir at law, before the 2d of December 1817, against whom *John Mercer* and *Margaret Mercer* brought an ejectment to January term 1818, No. 54, in the common pleas of Lancaster county, for the lands now in dispute, which being put to issue, came to trial, when the plaintiffs gave in evidence the deed of 30th of May 1785, to support the said ejectment, when the defendant requested the court to give it in charge to the jury, "that the deed of 30th of May 1785, from *James Mercer* and *Margaret* his wife, to *Nathan Thompson*,

prout said deed given in evidence by plaintiff to sustain his said suit, is not duly acknowledged to convey the estate of inheritance of *Margaret Mercer* so as to destroy the descent of the estate to the defendant her heir at law." Whereupon the court charged the jury that the said deed so acknowledged was sufficient to convey the said inheritance, and bar the descent thereof to the defendant as the heir of the said Margaret, on which charge a verdict and judgment being rendered in favour of the plaintiff, and a writ of error prosecuted by the defendant *Samuel Watson*, to the supreme court to May term, 1819, and on argument, "the said court reversed the judgment of the court of common pleas in this action." The said judgment of the supreme court being given on the very deed of 30th of May 1785, was conclusive evidence that the said deed was inoperative and void to convey the estate of the said *Margaret Mercer*, and that the descents of the estate of the said *Margaret Mercer*, on her death, to her sister *Sarah Watson*, and on her death to her son *Samuel P. Watson*, were valid and legal.

7. That the two judgments of the supreme court, given in evidence in this cause on the 31st of December 1808, and on the 3d of June 1820, on the very point of the deed of the 30th of May 1785, being by each of the records specifically presented to the said court for their judgment, and that the said judgments having not only decided that the said deed was inoperative and void to show title in the defendants in the first and the plaintiffs in the second ejectment, and in no way impeded the descent, under the intestate laws, of the estate of *Margaret Mercer* to her heir at law, but that the said heir was entitled to recover thereby, the said two judgments are conclusive evidence that the said deed of the 30th of May 1785, so far as the same related to the said *Margaret Mercer*, was null and void, and never after could become a legal instrument, after her death, and the treble descent, to *Sarah Watson*, and from her son *Samuel P. Watson*, and from *Samuel P. Watson* to his children, under the said judgment and the intestate laws before the 3d of April 1826.

8. Whether, under the two judgments in the two ejectments, *John* and *Margaret Mercer* becoming voluntarily nonsuit in the ejectment to January term 1818, No. 55, on the 12th of March 1821, did not amount to an acquiescence in the previous judgment, a voluntary submission to them and an equitable and legal relinquishment of the claim to the lands in dispute; and whether under the evidence given of the ejectment in 1802, and its result, and of the ejectments in which the two judgments were rendered against the deed of the 30th of May 1785, and in favour of the heir and the three descents cast before the 3d of April 1826, and the above nonsuit, when they had the power to try and would not, be cause for a perpetual injunction in chancery against further proceeding upon said deed, and whether the same would not *a fortiori* be a bar under the statute of the 13th of April 1807, the said records showing that the specific mode in which they were presented to the supreme court was a demurrer to

all intents and purposes and equivalent thereto, taken on the deed of the 30th of May 1785, in Pennsylvania, and if not, please to state the operation of these records and judgments and nonsuit and three descents, in equity and law in this cause.

9. That this cause is barred by the statute of limitations, by the suit brought on the 4th of February 1802, by the suit brought on the 4th of February 1805, and the proceedings and judgment rendered therein, and the *habere facias possessionem* and *fi. fi.* issued and execured thereupon; also, by the action of trespass for mesne profits and the recovery therein, prout said records respectively given in evidence in this cause and peaceable possession and quiet and undisturbed enjoyment of the lands for which this suit is brought, until it was brought on the 6th of May 1829; the recovery of the 31st of December 1808, and its execution, extinguishing the tortious possession from the death of *Margaret Mercer* and the action of trespass compensating for the lawless intrusion, *prout* the record thereof, making the possession continuous and co-extensive with the title, under the descents and the adjudications given in evidence.

10. That the act of assembly of the 3d of April 1826, read and relied on by plaintiff according to its just and true construction, was designed for the protection of purchases made *bona fide* and for full value, only, and not to interfere in favour of volunteers, to subvert rights previously acquired by three descents and corroborated by the strongest equities and the highest legal decisions.

11. That if the said act of 2d of April 1826, entitled a supplement to an act for the better confirmation of the estates of persons holding and claiming under femes covert, and for establishing a mode in which husband and wife may hereafter convey their estates, so far as the same operates upon the right and title acquired by the defendant's ancestors, by the decision of the supreme court, on the 31st of December 1808, in the suit then pending, and given in evidence in this cause; and again, in their decision on the 3d of June 1820, in the suit given in evidence in this cause; and also by the nonsuit given in evidence in another ejectment, given in evidence; and also by the ejectment brought on the 4th of February 1802, and given in evidence in this cause; and also by the three descents proved and given in evidence in this cause, is, if the said act was intended to operate on such rights so validated, descended and confirmed, unconstitutional and void.

12. What is the operation of the act of the 3d of April 1826, upon the land sold and shown by the deeds given in evidence in this cause, if the same is holden to have a retrospection in giving efficacy to the deed of the 30th of May 1785, given in evidence in this cause?

Whereupon the court charged the jury as follows, viz.—

Samuel Patterson owned the land in 1785, when he died. He left three sons and two daughters. The sons died without children, so that the whole estate came to the two daughters. *Sarah*

married *David Watson* and *Margaret* married *James Mercer.* In 1785 *Margaret,* intending to give her land to her husband, joined with him in a conveyance to *Nathan Thompson,* who conveyed back to *James Mercer. James Mercer* and *Margaret* his wife had no children, and on her death, if the estate had continued to belong to her, it would have gone to the defendants, who are the children of her sister *Sarah,* and her heirs at law. The defendants, therefore, contend, that the conveyance to *Nathan Thompson* was void, for a defect in the certificate of acknowledgement. That has been decided against the defendants by the supreme court; and this court and you are bound by the decision. It has been determined by the supreme court, that the act of assembly of 1826 cured the original defect. This can be overruled only by the supreme court of the United States. They can succeed, therefore, only by some other title. They claim a title by the statute of limitations. They claim to have been in the adverse possession of the premises from the death of *James Mercer,* in 1804, on the ground that the possession of the plaintiff, his executor, was their possession. If the deed from *Mercer* and wife to *Thompson,* and his conveyance to *Mercer* the husband, was good, and passed the estate to *James Mercer* (and the defendants stand in no need of the statute of limitations if they did not) this is strange doctrine. But even if these deeds were a nullity, yet the possession of the executors of *James Mercer* after the expiration of the estate of his wife, would not be under the defendants, but adverse to them. The possession of the executors contained no recognition of the defendant's title, but was inconsistent with it. But it is said, that the statute never was intended to validate the deed after the statute had run. The statute, however, could not run, if the possession of the executors, after the death of *James Mercer,* were not the possession of the defendants. It seems to me, that the possession of the executors was adverse, because they denied the title of *Sarah Watson* or her children. They held the land in trust for the uses declared in the will; that is, to sell it, and divide the price among *James Mercer's* devisees. This is a fact for you. But the intent of the statute was to make the conveyance good by relation from its date. It could be good in no other way; for if it were, the estate would vest for the first time in 1826, when the confirming law was passed. The statute of limitations, therefore, will not avail the defendants.

The former proceedings have been relied on as giving the defendants a title; that is, the verdict obtained by them, a nonsuit suffered by the plaintiff, and the several descents that have taken place of the property. I see nothing in all these to stand in the way of the plaintiff's rights. I dissent from Mr *Hopkins's* points, and cannot instruct you according to his request.

The jury found a verdict for the plaintiff, with six cents damages and six cents costs.

The defendants moved the court for a new trial on the following

reasons filed; and the motion being overruled by the court, they appealed to the supreme court for the same reasons, viz.—

1. The honourable court misdirected the jury on each and every of the points propounded to him, and on which he charged the jury.

2. The cause is barred by the statute of limitations.

3. This cause, under the evidence given in it, would have been perpetually enjoined, and any proceedings upon it by the plaintiff; and the honourable judge, exercising in this ejectment all the powers of chancery, through the medium of the jury, ought to have charged the jury, the suit was on equitable grounds barred and that they ought to find for the defendants.

3. This cause was barred under the act of 1st of April 1807; the question propounded to the court of common pleas to charge the jury upon, and the charge upon it, and the verdict and judgment rendered upon it, being in law and equity equivalent to, and the same as a demurrer; and the verdict and judgment equivalent to a special verdict, and the same as a special verdict, and the judgment of the supreme court, reversing the said judgment, on the 3d day of June 1820, and awarding no *venire facias de novo.*

5. The two judgments rendered by the supreme court, on the 31st of December 1808, and on the 3d of June 1820, conclusively establish, that the deed of 30th of May 1785, was no deed, but a mere nullity, which never afterwards was susceptible of confirmation by any act of the legislature.

6. The act of 3d of April 1826, was never intended to, nor does it in expression, operate upon this cause; and if it did, it is unconstitutional and void.

7. The defence given in evidence in this cause, and made a part of the record, makes a case, which is under the conclusive protection of the constitution of the state of Pennsylvania, and of the constitution of the United States, and placed beyond the power of the state legislature; and if the act of 3d of April 1826, was in intention or expression operative on this defence (which we deny) the said act is unconstitutional and void.

8. The verdict in this cause is illegal, and directly contrary to the evidence in finding for the whole lands in the statement, except that contained in the parts sold, when they showed title to part only, and in not finding and specifying the quantity the plaintiff showed he had title to (supposing—though not admitting—for the sake of raising the objection), by the evidence he gave.

Montgomery and *Hopkins*, for appellants, argued that the act of the 3d of April 1826, was confined to *bona fide* purchasers, who, at the passage of the act, were in possession of estates by virtue of deeds defectively acknowledged by *femes covert; Tate* v. *Stooltzfoos*, 16 *Serg. & Rawle* 35; and any other construction would bring it into collision with the tenth section of the first article of the constitution of the United States and the seventeenth section of the ninth article of the constitution of Pennsylvania. One of the first principles of

legislation is that all laws shall commence their operations *in futuro*; and every construction of a law, which gives it a retrospective effect is contrary to the plain principles of enlightened jurisprudence. If this act had been passed during the pendency of the suit in 1808, this court would not have given it an application to this case, much less now, since the whole right has been settled. The application of it now is to determine that the legislature may divest a right sanctioned by the most solemn adjudication of our courts. In this same case, reported in 1 *Binn.* 470 and 6 *Serg. & Rawle* 49, the doctrine is held that the acknowledgement by a *feme covert* is of the very essence of the deed, and not mere evidence. The wife's estate never was divested; but was in her during her life, and as certainly in her heirs after her death: can the legislature then, when twenty years have elapsed, take it from the heirs of the wife and give it to the heirs or devisees of the husband? *Case of Dartmouth College*, 4 *Wheat.* 656; *Fletcher* v. *Peck*, 6 *Cranch* 87, 135, 136, and 137.

Rogers and *Ellmaker*, for appellees, whom the court declined to hear.

The opinion of the Court was delivered by

KENNEDY, J.—The counsel for the appellants in this case, upon their argument of it, considered all the reasons assigned for taking the appeal as presenting three questions.

First. Whether the act of the general assembly of this commonwealth, passed the 3d of April 1826, entitled "a supplement to an act entitled an act for the better confirmation of the estates of persons holding or claiming under *femes covert* and for establishing a mode in which husband and wife may hereafter convey their estates," was intended to be applied to such a case as the present; and if it were, whether in this application it is not unconstitutional and void?

Second. Whether the plaintiff's claim is not barred by the act of limitations?

And third. Whether the plaintiff's claim is not barred by the fourth section of the act of the general assembly, passed the 13th of April 1807, entitled "a supplement to an act to regulate arbitrations and proceedings in courts of justice," passed the 21st of March 1806, (*Purd. Dig.* 228) which declares that "where two verdicts shall in any writ of ejectment between the same parties be given in succession for the plaintiff or defendant and judgment be rendered thereon, no new ejectment shall be brought, but when there may be verdict against verdict between the same parties, and judgment thereon, a third ejectment in such case and verdict and judgment thereon shall be final and conclusive, and bar the right; and the plea in ejectment shall be Not guilty."

As the first question was decided by this court at an adjourned session held here in November last against the appellants in another action of ejectment between these parties for the same land upon the

same title, after a very full and elaborate argument by the same counsel that appear in this case for the appellants, it was therefore thought unnecessary to argue it again. The decision of the circuit court upon it was against the appellants and in conformity to the decision of this court in the other case just referred to. By that decision and others made previously, this question is considered as settled by this court against the appellants.

I will now proceed to consider the next question, in regard to the statute of limitations being a bar to the plaintiff's action. By the second section of this act of the general assembly of this commonwealth, passed the 26th of March 1785, it is enacted, that "from henceforth no person or persons whatsoever shall make entry into any manors, lands, tenements or hereditaments, after the expiration of twenty-one years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action, for any manors, lands, tenements or hereditaments, of the seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action or suit so hereafter to be sued, commenced or brought." Now it is certainly true that according to the judicial construction put upon this act, the possession of land in this state by a person for the space of twenty-one years may give him such a right to the possession of it as will not only enable him to defend and protect his possession in an action of ejectment brought against him; but in case of his being ejected by force or even under a judgment had against him in an action of ejectment, will entitle him to maintain an ejectment for the recovery of his possession of the land again. *Pedrick* v. *Searle*, 5 *Serg. & Rawle* 240. But the owner of the land can only be barred by such possession where it has been *actual*, *continued*, *visible*, *notorious*, *distinct*, and *hostile* or adverse for the space of twenty-one years. *Hawk* v. *Senseman*, 6 *Serg. & Rawle* 21. And it is not necessary that the party claiming a right under such possession should have entered upon the land under a title or even colour of title; it will be sufficient, although he were a mere trespasser. Actual possession is one of the constituent parts of a perfect title to land, and may exist independent of the right in one who has neither the right of possession nor the right of property, and therefore may be transferred by him who has it to another who takes it after him and continues it, so that if the possession of the two added together will amount to twenty-one years it will be a bar against the owner if it has been adverse to him. *Overfield* v. *Christie*, 7 *Serg. & Rawle* 177; *Miller* v. *Shaw*, 7 *Serg. & Rawle* 129; *Lenox* v. *Farley*, 8 *Serg. & Rawle* 392; *Royer* v. *Benlow*, 10 *Serg. & Rawle* 303; *Manshower* v. *Patton*, 10 *Serg. & Rawle* 334. Neither is it necessary that the party should have his residence on the land to make the possession of it adverse and complete under the statute; enclosing

and cultivating it may be sufficient. *Johnson* v. *Irwin*, 3 *Serg. & Rawle* 291.

Now let us inquire and see when the appellants first took or got the actual possession of the land in dispute. They claim title to it as the heirs at law of *Margaret Mercer* who was the wife of *James Mercer*, under whom the plaintiff claims. At the time *Margaret Mercer* died, which was about the beginning of the year 1802, *James Mercer*, the husband, was in the actual possession of the land, and claimed it under a deed dated the 30th day of May 1785, conveying the land in fee to him from *Nathan Thompson*, to whom *James Mercer* and *Margaret* his wife, by their deed bearing the same date, had conveyed it in fee. This last deed was acknowledged by *James Mercer* and his wife before a proper officer, but on account of the certificate given by him of the acknowledgement having been made before him, which he indorsed upon the deed, being defective, it was adjudged afterwards, on the 31st of December 1808, by this court, in an action of ejectment brought by the appellants against the plaintiff, who claimed under the will of *James Mercer*, that it was insufficient to pass the estate of *Margaret Mercer*, the wife, in whose right the land was held until this conveyance was made by them to *Thompson*. The appellants, after having obtained a judgment in their favour, took the actual possession of the land, which was delivered to them under a writ of *habere facias possessionem* sued out to March term 1809. The action, in which this judgment was given, upon which they obtained possession, was commenced the 4th of February 1805, and the demise laid to have commenced on th 4th of December 1804. Previously, however, to this, they had brought another action of ejectment to February term 1802, laying their demise to have commenced on the 1st of February in that year, against *James Mercer*, who was then living, but died afterwards, in the latter end of 1804, pending the action, by which it abated.

This present action was commenced on the 6th of May 1829.

After this statement of facts, it appears to me that if a plain unsophisticated mind were asked the question, At what time did the appellants first obtain the actual possession of the land in dispute? that it would, without hesitation, say, Not until the spring of 1809, when it was delivered to them under the writ of *habere facias possessionem*. Statutes are generally to be understood and construed according to the ordinary meaning and common acceptation of their terms. Indeed it would be singularly strange and unreasonable were it to be held otherwise, since they are to be regarded as rules of civil conduct, and every one at his peril is bound to know and to understand them. But it has been argued most strenuously, by the counsel for the appellants, that when they were put into the actual possession of the land, under their recovery in the action of ejectment, that they were by operation of law remitted, in respect to their possession, back at least to the 4th of December 1804, the date of the

demise upon which the recovery was had, if not to the 1st of February 1802, the date of the demise in the first action of ejectment; and counting their possession as an actual one from either of these dates to the 6th of May 1829, when this action was commenced against them, would be a period of more than twenty-one years, and that thus they had been in the actual possession of the land; and that the plaintiff is therefore barred by the act of limitations. It seems to me that to adopt this construction of the act, in respect to what shall constitute an *actual adverse* possession and the *time* at which it shall be considered as having *commenced*, would be disregarding entirely the rule already mentioned, by which every one may read and understand the statute, and substituting another which could not enter into the mind of one in every fifty thousand; and at the same time would be giving to the act a meaning, in this respect, so perfectly artificial, if not fanciful, as to be unintelligible to most minds.

But again, what would be the effect of such a construction in practice? If a person who had a claim of doubtful character to land in the possession of another claiming under an adverse title, were to lie by until a few days before the twenty-one years had run and then bring his action of ejectment, laying the date of the demise in the declaration (supposing the form of the action of ejectment that was in use at the time of passing the act of limitations to be still in force) back twenty years eleven months and twenty days, the time at which his claim or title first accrued, and he should be fortunate enough to succeed on the trial of it, by obtaining a verdict and judgment, under which he is put into the actual possession of the land after the twenty-one years from the date of his demise have run; he would, according to the exposition of this act contended for by the counsel of the appellants, be protected completely, although his adversary had been in the actual and continued adverse possession of the land twenty-one years, wanting eleven or twelve days before the commencement of the action of ejectment, and more than the twenty-one years before the trial of the cause; while the successful party in the action, on the contrary, had not been more than one day, and that too after the twenty-one years from the date of his claim had run. Thus, instead of making the act a shield for him who was in the *actual* possession of the land, improving it, and by doing so adding wealth and power to the commonwealth, as was intended; would it not be turning it completely to the advantage of him who had neither been in the *actual* or *constructive* possession, but, on the contrary, lying by, out of the possession, not even making an effort to obtain it, until the twenty-one years had all but expired, when he commences his suit and, by a lucky and perhaps doubtful verdict and judgment, he is put into the *actual* possession of the land for the first time? Then, by the force of imagination, his *actual* possession of the land is made to relate back to the commencement of his title. Although the principles of the common law may in some instances

permit a fiction to prevail, in order to prevent mischief or to afford and advance a remedy for an injury sustained by the violation of a *real* subsisting right, yet it will never be allowed to work an injury, or to *create* a right or title that has no existence. The rule is, *in fictione juris semper equitas existit;* hence a person who has a perfectly good and available title to land, the possession of which was illegally withheld from him until he recovered it by suit, may, when thus restored to the possession, be considered by relation back as having been in during all the time he was kept out of it, so as to enable him to recover the mesne profits for that period, but he will not be permitted to invoke such *imputed* possession for the purpose of creating title or of aiding a defective one. In short, fiction is altogether inadmissible whenever it would defeat or militate against the operation of an act of the legislature.

It has also been contended that *James Mercer*, immediately upon the death of his wife, became, by the then existing law of the state, the tenant of the appellants. That he came within the description of a tenant at sufferance, by having obtained the possession lawfully through his marital rights, and continuing to hold it after the death of his wife, when his title or right ceased. 2 *Bl. Com.* 149, 150. Now, admitting the statute of 32 *Hen.* 8, *ch.* 28, *sec.* 6, to be in force here, and that the alienation of *James Mercer*, the husband, who was seised in right of his wife, did not, therefore, work a discontinuance of her estate, as it would otherwise have done at common law; still it cannot be doubted for a moment, but that he conceived and was firmly convinced in his own mind, that by means of the conveyance executed by him and his wife, to *Nathan Thompson*, and the reconveyance from *Thompson* to him, he became invested with a perfect indefeasible title to the land in fee simple. As corroborating evidence of this, it seems that he resisted the claim of the appellants, in consequence of which they brought an action of ejectment against him, on the 4th of February 1802. From this time, the possession of *James Mercer* was clearly adverse, and in direct opposition to the claim of the appellants. By bringing the action of ejectment against him, they declared him a trespasser, as neither holding the possession under or for them; so that after recovering in their action of ejectment, they could not have maintained an action of *assumpsit* for the use and occupation of the land subsequently to that time. 1 *Term Rep.* 378. If *James Mercer* had at any time admitted himself to have been the tenant of the appellants, holding possession under or for them, then his possession might, with great propriety, be considered in law their possession, or at least would not have been hostile or adverse to them. The intention of the legislature as manifested in the act of limitations was, that wherever a person was permitted to hold the actual possession of land either by himself or his tenants, without recognizing or admitting right or title to it in any other, but uniformly claiming and exercising acts of ownership over it as his own, for the space of twenty-one years or upwards, that he should

thereby acquire a right to it, the peaceable and quiet enjoyment of which thereafter should be made secure to him. It was designed most expressly as an act of repose. At the time this act was passed, the most of the lands within the state being wild and uncultivated, it was thought advisable to encourage the improvement of them, and among several acts of the legislature, passed with that view, I think, the act of limitations may be considered as one of the number. But independent of this, the legislature doubtless intended to promote and establish the peace and quiet of society, so far as securing men in the future enjoyment and peaceable possession of lands, which they had held adversely to all the rest of the world, and been improving for a space of twenty-one years or upwards, could conduce to that end. This being the main object of the act, *constructive* and *imaginary* possessions or tenancies are not to be raised when they would have a tendency to defeat this end. On the contrary, it is the duty of courts to give such construction to the act as will most effectually carry into effect the design of the legislature. See *Thompson* v. *Smith*, 7 *Serg. & Rawle* 209, 210. Under this view of this question, I am brought to the conclusion, that the appellants never had any possession of the land in dispute which the act could operate on until 1809, when they got it under their writ of *habere facias possessionem;* and as this action was commenced against them within twenty-one years after, that they are not protected by the act of limitations.

I now come to the third question which has been presented and argued by the counsel for the appellants; and I am inclined to think that the facts in their case do not bring them within the provision of the fourth section of the act of 1807 already recited. According to the letter of it, there must be *two verdicts* and *judgments rendered thereon* in favour of the same party, in order to form a bar against another action; but in this case the appellants never had more than one verdict in their favour, upon which a judgment was rendered by the circuit court, where it was tried, and afterwards affirmed upon appeal by the supreme court. In the action of ejectment commenced against them after they got possession of the land under the judgment in their favour, the verdict and judgment of the court thereon were against them, instead of for them; and had this latter judgment not been reversed upon writ of error, the question, which of the parties had the better right to the land, might have been considered perfectly doubtful. It, however, has been argued, that, as this reversal of the judgment against the appellants was given without awarding a *venire facias de novo*, it ought, upon an equitable construction of the act, to be deemed equivalent to a second verdict and judgment in their favour; and that such construction ought to be given to it, otherwise the mischief intended to be remedied will not be effected. After assuming, that the evil existing at the passage of this act, and intended to be redressed by it, was, that the parties litigating the title to land were at liberty to harass and vex each other

with as many actions in ejectment in succession as they pleased—in short to make the strife interminable, it is contended, that the legislature, therefore, resolved to place some reasonable limitation upon such course of proceedings, by restraining the losing party from continuing the warfare after his adversary had succeeded in two different actions, by obtaining in each of them a positive judgment of a court of competent jurisdiction in his favour upon his title. And that wherever that is had in a manner which affords the party losing the same chance of success that he could have in taking the verdicts of juries and judgments of the court thereon, his case ought to be considered as embraced by the act, and coming within the plain and obvious meaning of it, although not within the letter: as, for instance, where two judgments have been rendered in favour of the same party in two successive actions, upon cases stated by the parties, or in issues joined in demurrer to the pleadings, or upon demurrer to the evidence, instead of upon two general verdicts upon the same title to the same land. Now, admitting this reasoning and view of the matter, in support of the construction which this act ought to receive, to be correct, and I think there is great force in it, still the case of the appellants falls short of those put by way of illustration. The second judgment which the appellants claim to have had in their favour, was merely a judgment of reversal, pronounced by this court; which went no further than to ease or relieve them from the operation of a judgment considered erroneous on account of a question of law, whether a deed of conveyance had been executed and certified in such manner as to make it effectual for a certain purpose or not, having been decided incorrectly by the court below. It cannot be taken as a judgment of this court, rendered in favour of the appellants, after an examination of the whole ground of controversy, and of the respective titles of both parties. The impropriety of admitting it to have such an effect as contended for, is very apparent; because the state of the record from the court below does not present in such case to the court above, the whole chain of title produced by the parties respectively in the court below, and under which they claimed the possession of the land; and therefore it is, that the judgment of reversal cannot be considered a judgment concluding the parties from all further litigation of the title to the land. But in the case of an erroneous judgment being rendered in the court below upon a case stated, issue joined in demurrer to the pleadings, or on demurrer to the evidence, the court above have, by the record returned to them, a view of the whole case presented to them, and will not only reverse the judgment of the court below, but give the judgment which the court below ought to have rendered; which is to be looked upon as the conclusion of the law resulting from all the facts and circumstances involved in the cause; whereas a judgment merely reversing the judgment of the court below rendered upon a general verdict, may be, and often is, for a cause that does not ultimately vary or change the final determina-

tion of the case. And to say, that the reversal of a judgment rendered upon a general verdict without awarding a *venire facias de novo*, shall cause it to have a different effect from what it would otherwise have, and make it conclusive against all further litigation of the same cause of action, would be carrying it too far, and beyond the sanction of either reason, practice or authority. It may furnish some ground to presume, that the party against whom the writ of error was sued out, or the court, or both if you please, thought, that from the nature of the case that had been declared, *a venire facias de novo* would not be likely to be available to the defendant in error, but not to prevent absolutely his bringing a new action, in case he should afterwards change his mind, or discover that he can supply what was wanting before, or in any way overcome the difficulty or objection then interposed to his recovery.

Upon the whole, I am satisfied that upon the most equitable construction, that the object assigned for the passing of the act, and, from the terms employed in it, that the legislature did not intend to bar the party from bringing a new action of ejectment for the same land, upon the same title, until after two decisions should be had against him upon a full view and consideration of the whole of his case, and all the circumstances connected with it which he might think material, either by two judgments of a court of competent jurisdiction rendered upon general verdicts, special verdicts, cases stated, or in cases of demurrrer to the pleadings or the evidence.

Beyond what the act in this behalf, upon a reasonable construction of it, will warrant, we are not at liberty to go. What a court of chancery would do or has done under similar circumstances, is not to be our guide; because I consider the act of assembly as having been given to us for the rule of our decision as to the number of actions of ejectment, verdicts and judgments that shall be a bar to any subsequent action between the same parties, upon the same title, for the same land.

The judgment of the circuit court is affirmed.

A CAUSE between the same parties, for the same land, was brought before the supreme court, by a writ of error to the district court of *Lancaster* county, which presented some points not embraced in the foregoing case; it was argued at an adjourned court held in November last.

After verdict and judgment in the circuit court below, *Jane Watson*, the mother of the defendants, presented a petition to the court, setting forth, that some of her children, who were defendants, were minors, and praying that *a writ of error coram vobis* might issue; it

was issued, and the error was formally assigned, and the question argued. The opinion of that court embraces all the material facts, and is here given, because of the extensive examination made of the subject by his honour, the president of the court.

A. L. Hays, president.

The plaintiffs, on the 9th of June 1829, assigned for error that *Patterson Watson*, *Hetty Watson*, *Maria Watson* and *Jane Watson*, defendants in the action of ejectment, appeared by attorney, although at the institution of the suit, and at the time of their appearance, and at the trial and rendition of judgment, they were minors under the age of twenty-one.

To which the defendant replied by his plea, that before the return day of the writ of ejectment (which issued on the 26th of April 1826), *Jane Watson* was (viz. on the 6th of June 1826) duly appointed by the orphan's court of Lancaster county, guardian over the persons and estates of her children, the minors aforesaid; that the said *Jane Watson*, who was co-defendant in that suit, and one of the plaintiffs in error, employed *James Hopkins* and *John R. Montgomery*, esquires, to appear as counsel in the action of ejectment, not only for the purpose of defending her own rights, but also the rights of her said wards; that the said *James Hopkins* and *John R. Montgomery*, upon the return of the writ of ejectment, on the 12th of June ensuing, appeared for all the defendants, and entered their appearance of record, and on the 11th of September 1825, put in the plea of Not guilty for all the defendants; that the said *Jane Watson*, guardian, &c., personally attended on the 6th of December 1826, at the trial of the cause, and that the plaintiffs in error never alleged, during the whole trial, nor until after verdict, that the minors were not defending the said ejectment by their guardian, *Jane Watson;* that after the verdict, the defendants, on the 8th of December 1826, moved the court for a new trial, alleging as a reason the infancy of the above named minors, verified by the affidavit of *David Watson*, and not by the oath of *Jane Watson*, their guardian; and that the district court, after full hearing, discharged the rule, which had been granted to show cause.

The plaintiffs to this plea have demurred, setting forth the following causes of special demurrer, viz.

1. That the plea is argumentative, evasive, and no answer to the assignment of errors.

2. That it is contradictory and repugnant to the record.

3. That it assigns to *John R. Montgomery* and *James Hopkins*, esquires, the duty of appearing for the defendants as counsel, when that duty belongs to attorneys and not to counsel.

4. That the plea has not any relevant, pertinent or issuable matter in it; *John Mercer* being estopped and precluded, by the record of this ejectment, from alleging any of the matters in the said plea.

5. That the plea contains no venue.

6. That it is in other respects uncertain, informal and insufficient in law.

The defendants in error joined in the demurrer, and the court having heard the arguments of counsel and maturely considered them, I now proceed to give my opinion, with the reasons on which it is formed.

And first, as to these causes of special demurrer.

The plaintiffs object that this plea is argumentative, evasive and no answer to their assignment of errors; but they have omitted to specify in what respect or particular it is chargeable with these faults. There is nothing but the above general allegation. It is, nevertheless, perfectly settled with regard to the degree of particularity, the special demurrer must assign the ground of objection, under the statutes requiring the party to set down and express his special exceptions in demurring for form; that it is not sufficient to object in general terms, that the pleading is "uncertain, defective, informal, and the like," but it is necessary to show in what respect it is uncertain, defective, informal, &c. This objection, in the manner in which it is here stated, is nothing more than the allegation of the general demurrer repeated, and it is clearly insufficient as a ground of special demurrer.

2. They object in the second place, that the plea is contradictory and repugnant to the record. If a pleading be inconsistent with itself, that is a fatal defect on special demurrer. As in an action of trespass, the plaintiffs declared for taking and carrying away certain timber, lying in a certain place for the completion of a house, *then lately built*, the declaration was considered bad for repugnancy; for the timber could not be for the building of a house *already built*. But the objection here stated is not that the plea is repugnant in itself, but that it is repugnant to the record; which is equivalent that it is a false plea, because it is contradicted by the evidence of the record. A false plea, however reprehensible, is not to be taken advantage of by special demurrer, unless the falsity appear by the plaintiff, for, though false in fact, it may be good as to form; and in general there is no way of proving the falsehood of an allegation in pleading until issue had been taken and trial had upon it.

3. With regard to the matter of the third objection, I understand the plea as averring that *Jane Watson* employed *James Hopkins* and *John R. Montgomery*, esquires, to appear as counsel to defend her rights and those of her wards in the action of ejectment, and that they accordingly did so appear. In this there is no informality, nor any kind of inaccuracy. It is true, parties are technically and properly said to appear to suits by attorney and not by counsel; but this plea did not intend to aver a mere technical appearance of the minors by attorney, but an appearance by guardian. To have averred an appearance by attorney would have confessed the error assigned. Counsellor and counsel are terms familiar to the law. Their pro-

vince is not simply to appear to actions, it is to conduct the suit by their advice and advocacy through all its progress and in the difficult emergencies of a trial by jury and of arguments before the court. The fact of the application of the guardian to counsel to defend the rights of her wards as well as her own, and of their actually engaging in such defence, is set forth in this plea with due formality. The third objection is therefore not sustained.

4. The fourth is, that defendant is estopped from averring any of the matters in the said plea by the record of the ejectment; and that the plea therefore contains no relevant, pertinent or issuable matters in it. The marking of the names of counsellors or attorneys in the margin of the docket is chiefly intended to notify the court and the opposite party, of the fact that such attorney or counsellor is concerned in the causes. Additional names are often marked after the regular appearance is entered, and the pleadings are concluded; and it not unfrequently happens that counsel appear, without any marginal note of the circumstance, or any entry on the record to indicate it. The omission certainly would not preclude a party from averring or showing the real state of the fact; and therefore if the attorneys' names were marked as appearing for one of several parties, evidence might still be adduced to show that he appeared for all. This objection goes the length of asserting that any entry of an attorney's name on the margin of the docket of a suit, shall estop the adverse party from showing that the attorney did not in fact appear at all, or that the party appeared by any other person. But the rule of law is, that a man shall only be estopped *by his own act or acceptance*, to say the truth. Nor will a record estop when the thing alleged is consistent with it. Therefore where the mere marginal noting may mean that the person whose name is thus marked has engaged his services as attorney or counsel, the *adverse* party especially is not precluded from saying that he appeared as counsel. For an estoppel ought to be certain to every intent; and if a thing be not directly and precisely alleged, it shall be no estoppel.

5. The fifth objection of want of venue in the plea was properly abandoned on the argument. And the

6. Sixth and last, being inoperative and insufficient on account of its generality; I find nothing in all these objections (and it is not competent to go out of the grounds specially assigned by the plaintiffs) which justly affects the form of this plea.

The question then occurs upon the substance of it, the facts therein stated being admitted by the demurrer; whether there was in the action of ejectment, a sufficient appearance for the defendants, who were minors, or not.

On the argument for a new trial no definitive opinion was formed by me upon this question. So far only I proceeded in the investigation, as to discover that it was by no means clear, that there was not good appearance by guardian, and I therefore was of opinion that there ought not to be a new trial. I state the fact now, partly be-

cause it was assumed on the argument of the demurrer, that the the question had been decided on the former occasion, and partly in order to introduce the remark that I have, on the demurrer, taken up the subject *anew*, and investigated it without, I believe, being biassed by any preconceptions.

The first principles of justice require that they who are incapable from want of judgment and experience of transacting their own affairs, should not be permitted to become victims of the cupidity, superior knowledge, and skill of others. To this class belong infants and minors. It is accordingly declared by Justinian, in his Institutes, to be agreeable to the laws of nature, that the persons under puberty, who by reason of their unripe age are unable to protect themselves, should be under the government of such as could protect them ; and, therefore, by the civil law, guardians, who were called tutors or curators, were assigned to minors, without whose sanction no contract would bind an infant, though it was binding upon the other party.

Upon the same principle the French Code commits minors to the care of a tutor, who is to take charge of their persons, and represent them in all civil transactions, manage their property, and be accountable for the damages or injuries occasioned by their misconduct. The guardian, at common law, performs the office of tutor or curator of the Roman civil law, the former of whom, says Blackstone, had the charge of the maintenance and education of the minor, the latter the care of his fortune. Infants have various privileges and various disabilities, and even their disabilities are privileges, since their effect is to secure them from hurting themselves by their own improvident acts. They are regularly allowed to rescind all contracts *in pais* made during minority (except for schooling and necessaries), be they ever so much to their advantage; and the reason assigned is the indulgence the law has thought fit to give infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing them from being imposed upon or overreached by persons of more years and experience. Wanting discretion to make a contract to any amount however inconsiderable, they are, *a fortiori*, deemed incapable of safely conducting a law suit, and are therefore not suffered to endanger their rights by pursuing a claim or defending a suit in a court of justice, without the aid of some one whose judgment and ability may supply their deficiency. Hence, among the privileges conceded to infancy, is the rule that they cannot sue but by guardian or *prochein ami*, nor be sued but under the protection of their guardian, whose duty it is to defend them against all attacks, as well by law as otherwise, a rule than which none can be more extensively recognized, or established upon a better foundation.

What then is meant by an appearance and defence in an action, and particularly, when it is said that an infant shall appear and defend by guardian? This is considered as an important privilege of the infant: justly so, for it is evident that his privileges with regard

to contracts and other transactions would be of slight utility, if he were liable to be dragged into court and exposed there, unprotected in his ignorance, to contend with skill in business, with learning and experience.

There is no imaginable situation in which an infant would be likely to suffer more from imbecility of understanding. It may easily be seen that, under these circumstances, he would soon be stripped of his all. It is to protect him against such danger, that, the law assigns him a guardian in the suit. This guardian is to do for him what with riper judgment he would do for himself; he is to appear for him in his proper person, employ competent attorneys and counsel to prepare and plead his cause; he is to collect testimony, summon witnesses, and at the trial to afford such aid to his counsel as may be necessary in unexpected difficulties. It is only by exercising that attention and vigilance in the cause of the minor, which he would exert in his own, that he fairly discharges his duty. When all this has been done, every thing in point of privilege has been secured to the infant which the law contemplates, or justice demands. It is something more than a mere technical defence, which is required by the guardian; for these he might furnish, and yet abandon the essential interests of his ward, by coming in at the return of the writ and entering a plea, and afterwards wholly neglecting the cause. An appearance in general is either by the suitor in his proper person, or by his attorney. But the infant cannot appear in his own person, nor can he authorize an attorney to appear for him; he can only appear by his guardian, who derives his authority, not from the infant, but from the court by which he is appointed. In England the guardian is either assigned by the court in which the suit is brought, or by writ out of chancery; every court there having the power *ex necessitate* of assigning to an infant suitor a guardian *pro lite*, and it is requisite that the guardian should be specially admitted to prosecute or defend. The guardian in case of an infant defendant, is constituted upon the infant's appearance with the person intended before a judge at his chambers, or else upon his petition accompanied by an agreement signed by the intended guardian, and an affidavit of the fact. The judge thereupon grants his *fiat*, upon which the rule or order for the admission is drawn up by the proper clerk. If the defendant does not appear by guardian in the time allowed by the rules of court, the plaintiff must procure an affidavit of the service of the writ, and that the defendant is an infant and has not appeared; upon which an order will be granted, that unless the infant appears, within six days after the personal service of the order, plaintiff may assign *John Doe* for his guardian, and enter appearance for defendant. A record of the admission is made in the common pleas, but in the king's bench it is only recited in the court, &c., as, *J S, per A B, guardianum suum, ad hoc per curiam specialiter admissum*, &c. But this record appears not to be essential, for where the plaintiff, being an infant, had sued by his guardian, but the entry on the roll

was no more but *J S, guardianum suum*, omitting the clauses, *per curiam specialiter admissum*, as the common course is, *and* as it was alleged it ought to be; but, *per curiam*, the entry is sufficient, for if, in fact, the guardian was not admitted by the court, a writ of error lies.

In the present case, *Jane Watson*, the first named defendant, and mother of the said minors, was appointed, by the orphan's court of this county, between the issuing of the writ and its return, guardian of the said minors; she employed counsel to appear and defend her own rights and those of her wards in this suit: who accordingly appeared on the return of the writ, and afterwards entered the plea of Not guilty for all the defendants. She moreover personally attended at the trial of the cause, which was conducted on the part of the defendants by her counsel; and it was never alleged, during the whole of the trial, nor after verdict, that the said minors were not defending by their guardian.

But still it is contended that it was the duty of the plaintiffs in the ejectment to apply to this court, conformably to the English practice, for the purpose of having a guardian assigned *ad litem* for the defendants, who were minors. This however was urged without adverting to the provisions of the act of assembly, passed the 27th of March 1713, by which the power of appointing guardians is vested in the orphan's courts, and the guardians so appointed are constituted *pro lite* in general, as well as for every other purpose. The seventh section enacts that, "all guardians and *prochein amis* which shall be appointed by any of the said orphan's courts, shall be allowed and received without further admittance to prosecute and defend all actions and suits relating to orphans and minors, as the case may require, in any court or courts of this province." Thus the necessity and with it the power of assigning guardians *ad litem* is taken from the other courts, wherever the orphan's court has made an appointment. Nor is it by any means requisite that the orphan's court guardians should be specially admitted in the other courts, for the express language of the act is, that he shall be allowed and received *without further admittance*. As *Jane Watson* was, at the return of the writ of ejectment, the lawful guardian of the minors in question by regular appointment of the orphan's court, any application to this court to assign a guardian *ad litem*, or to admit the guardian, would have been idle and improper.

It is to be observed, that this action was well brought. It is not necessary that the guardian should be joined in the writ, and it was impossible in this case to connect with the minors, the name of a guardian as such, because when the writ issued there was no guardian.

But *Jane Watson* having become the guardian of her co-defendants, who were minors, and been summoned with them, they enjoyed all the advantage of being joined with their guardian in this suit to every intent. Had she been appointed before the suit was brought, and the writ had run against *Jane Watson*, and the minors (naming

them) by the said *Jane Watson*, their guardian, and had all the proceedings up to the finding of the jury taken place precisely as they have, would there have been any ground for cavil in this case? And yet, as it would not have been necessary to have added, "by *Jane Watson* their guardian," though she were guardian, it is difficult to tell why the case would have been better with these words than without them.

But it is contended further, that the gentlemen who acted as counsel for the defendants, appeared for them as their attorneys in the ejectment, because they are in fact attorneys of the court, because their names are marked upon the record in this suit, and because counsel or counsellors are unknown to our laws.

If by our laws be meant our acts of assembly, the reference, I conceive, would be too limited to establish the position contended for, since these acts constitute but a small portion of the laws by which we are governed. But in point of fact, counsel and counsellor are terms recognized by our constitution, and by the various acts of assembly. They are terms also familiar to the language of the bar and the bench, to the reported decisions of our supreme court, and they occur in the rules of all our courts. The first of the rules of the court of common pleas of this county, which are adopted by the district court, commences thus: "no person shall be admitted to practise as attorney or counsellor at law unless," &c. It is true, the gentlemen who appeared as counsel in this case, are attorneys of the court, and that their names are marked upon the record of the present action. No conclusive argument, however, is deducible from either of these circumstances. In England, attorneys, and counsel or barristers, constitute separate and distinct orders of the legal profession; and a barrister or counsellor cannot act as attorney, unless he first apply to his society to be *disbarred*. Attorneys at law properly so called, were introduced by the statute of Westminster, 2 *C.* 10, by which suitors were first permitted to appoint agents in their place, stead or turn, to manage their matters of law in their absence; anterior to which, parties were obliged to appear in person to prosecute or defend their suits, unless by special license under the king's letters patent. Yet it seems, says *Stephens*, author of the learned and elegant treatise on the Principles of Pleading, that this is only to be understood of appearance by attorney, and not the conduct of the suit after appearance once made. *Bracton* makes express mention of pleaders, counsel and advocates in the reign of *Henry* 3, and it appears that there were persons learned in the law, and skilful in pleading causes, as early as the reign of *William Rufus*. Appearance by attorney, and appearance by counsel in a cause, are distinctly different: the former being the substitution of a legal agent for the personal attendance of the suitor; the latter, the attendance of an advocate, without whose aid, neither the party attending in proper person, nor his attorney in his stead, could safely proceed. The appearance by attorney does not, any more than the personal appearance of the suit-

or, preclude or supersede the appearance of counsel; so neither does the appearance by guardian. The infant's privilege would be miserably abridged, if his guardian could not avail himself of the aid of counsel, in litigation with those who had the advantage of such assistance. With us, counsel are always attorneys, and by the rule just cited, members of the bar are admitted to practise, either as attorneys or counsellors; but though the characters are united in one person, the functions of attorney and counsel are as distinct here as in England. Our counsel then, as attorneys, appear for suitors, representing them before the court as their substitutes, and in their absence; but as counsel, they likewise appear to manage and conduct the suit through all its subsequent progress. As counsel, not as attorneys, they appear for those who are before the court *in propriis personis*, for he who appears in his own person, cannot appear by attorney; and as counsel, not as attorneys, they appear for guardians, who must appear in their proper persons. Upon the entry of the names upon the margin of the record, some observations were made in reference to the fourth objection of the special demurrer. These entries are often made in our practice, after the appearance by the party, or by attorney. When a counsel is taken in at the trial court, it is not unusual, I believe, for him thus to enter his name. The entry, denoting, as it may, either an appearance by attorney, or an appearance by counsel, is to be construed by the fact, and not the fact by the entry. To resort to the supposition before made, that the writ in this case had been against *Jane Watson*, and the minors (naming them) by the said *Jane Watson* their guardian; would the marking of the names of the counsel employed by her, have furnished the slightest objection? But as it was not necessary under any circumstance, that the writ should have been so framed, and according to the facts it could not have been so framed in the present case; can that *now* be any valid objection, which an immaterial and unnecessary addition would have obviated? Every thing appears to have been done by the guardian in defence of this action, that the protection of the minors (the principle on which the institution of guardianship is founded) required to be done. And indeed, such was *Jane Watson's* situation as co-defendant, with interests in the cause similar to those of her children, that she could not have omitted any thing essential which her duty as guardian demanded, without sacrificing her own rights, together with those of her wards. There has been then, in fact, and to every beneficial purpose, an appearance of the minors by their guardian: shall it be said that all this is to go for nothing, because the record has not, by some formal entry, exhibited the fact of such appearance? This proposition it would be difficult to maintain, even by the strict precedents of English proceedings. Many acts of parliament now in force, require attorneys to file their warrants in every action, yet the practice has wholly fallen into disuse, and warrants of attorney are in England neither taken or filed. By an act of 25 *George* 3, it is enacted, that no attorney shall com-

mence an action, or appear for any defendant by a warrant of attorney, written or verbal, without delivering a memorandum or minute to the proper officer to be filed of record. Yet no omission or defect in the entering and filing of this memorandum shall vitiate the proceedings. Our own act of assembly of the 22d of May 1722, requires the attorney for the plaintiff in every action to file his warrant of attorney in the prothonotary's office, the same court that he declares; and the attorney for the defendant, the same court he appears; and provides, that if they neglect to do so, they shall have no fees, nor be suffered to speak in the cause until they file their warrants respectively, evidently intending that this should be the only proper and allowable evidence to the court of the authority of the attorney to appear in the suit. But it is not the practice, and I presume never has been, in this state, to file or take warrants of attorney; still, however, the attorneys receive their fees and speak, without their authority ever being called in question. We have seen by the case already cited from *Carthew*, that although it is error in England, if the guardian be not in fact admitted by the court, yet the omission of the fact on the roll is immaterial; so, applying the reason of that case to the present, I would say, it is of no consequence that the appearance of the guardian is not entered on this record, for if she had not *in fact* applied, it would have been error.

The cases of *Beverly* v. *Miller*, 6 *Mumford's Rep.*, and *Priest et al.* v. *Hamilton*, 2 *Tyler's Rep.* support the conclusions to which I am led, being similar decisions upon facts much less forcible. It appears, that neither in Virginia nor Vermont have they any law with a provision like that contained in the seventh section of our act of 27th of April 1713, but that the minor defends by guardian specially admitted by the court. In *Priest et al.* v. *Hamilton*, the infant had no guardian except the natural guardian his father, who was not connected with the suit as a party, who merely employed attorneys to defend the minor in the action; but who was not cited as guardian, nor was he appointed or admitted as guardian by the court. On demurrer, such appearance was nevertheless held to be sufficient. In *Beverly* and *Miller's* case, the special admission of the guardian by the court is recognized as the regular proceeding in Virginia; but where a suit against infants was defended by their mother, who had been appointed guardian by the county court, and her answer was received for them, and full defence made under the sanction and authority of the chancery court, the infants were then held to be equally bound by such defence, as if she had been in form appointed by the court guardian *ad litem*. This, it is true, is a case in chancery, but I do not find that the court of chancery is in any degree less strict respecting the admission of guardians and the defence of minors, than the courts of common law. In England, the rule in chancery is rigid, that an infant must appear and defend by guardian; and must either come into court to have him appointed, or there must be a commission for

that purpose. Even where an infant was abroad and could not be brought into court, Lord *Eldon* refused to make an order permitting his mother to put in an answer as guardian, but said, that a commission must go.

There is, however, another view of the proceedings in the present case, which seems to be conclusive, and with which I shall close this argument. In a regular record, the plea for the appearance of the defendant, is in the commencement of the plea, of which it forms a principal part. The plea in this ejectment was entered, conformably to our practice, in short, thus, "defendants plead Not guilty." But pleading in short is matter of indulgence, not of right, for the adverse party may insist and the court may order that the plea be drawn up at length, the short plea or entry being regarded only as a substitute for the full and perfect plea. The counsel having undertaken to defend the rights of the minors in this action, as well as those of *Jane Watson*, were bound to do it in a proper manner, and they did so, by the plea which they caused to be entered and exerted themselves to maintain. The short entry, "defendants plead Not guilty," is equivalent to, and stands for, the full and perfect plea drawn out in form, which would run thus: "and the aforesaid *Jane Watson*, in her proper person (or by *James Hopkins*, her attorney), and the aforesaid *Patterson Watson*, *Hetty Watson*, *Maria Watson* and *Jane Watson*, who are minors under the age of twenty-one years, by the said *Jane Watson*, their guardian, come and defend the force and injury when, &c. and say that they are not guilty of the said supposed trespasses and ejectment above laid to their charge, or any part thereof, in manner and form as he, the said *John Mercer*, hath above complained against them, and of this they put themselves upon the country, &c." Under the facts and circumstances of this case, therefore, the short plea of Not guilty does in legal contemplation include the statement of a regular appearance of the minors by their lawful guardian, and it does not lie in the mouth of the defendants, especially, who have chosen to use the indulgence of pleading in short, to object to this legal, fair and equitable construction.

To conclude, some apology might be deemed necessary for the great and unusual length of this opinion, were not a thorough investigation of the questions raised upon the demurrer demanded by the peculiar circumstances and course of these proceedings and by the importance of the questions themselves.

I also acknowledge a desire of evincing to the counsel that I have not been inattentive to their arguments, and whatever may be the ultimate issue, I have at least endeavoured to find out and pursue the true path to the justice of this case.

Let judgment be entered for the defendants in error.

Errors assigned.

1. There is error in the answers of the court to each of the points of law propounded by the counsel for the defendants.

2. The verdict is illegal and out of the issue, and the judgment entered upon it irregular and void.

3. There is error in rendering judgment on the demurrer joined, and in each and every part of the opinion of the court on the general and special demurrer in all the causes of demurrer.

4. The general errors.

The opinion of the Court was delivered by

Gibson, C. J.—To enable married women to convey their estates gratuitously or for value, they were clothed, by the act of 1770, with the capacity of *femes soles*, subject to the concurrence of the husband, and the examination of a magistrate to guard against an improper use of his influence. The cause which induced the supplementary provision of 1826, is recited to be, that conveyances of estates "sold for a legal and sufficient consideration," had failed of effect, by reason of an opinion entertained by the courts, that a specification of the particulars was essential to the validity of the separate examination; and hence an argument that the benefit of the provision was intended for none but purchasers. Undoubtedly a sale is put as an instance in the preamble; but the enacting clause is applicable in its terms to every "*bona fide* conveyance" whatever. What may have been meant by these words, can not be determined with certainty, from the context or their intrinsic meaning. A restraint of the remedy to *bona fide* transactions may have been intended to leave the question of actual imposition or constraint an open one, in order to let in proof to rebut the inference of fairness and free agency, to be drawn in the first instance from the naked fact of acknowledgement; but the words certainly have no relation to a purchase, nor do they indicate the presence of a valuable consideration, or any thing, perhaps, beside an untrammelled intent to pass the estate. Certainly there was no design to clog the remedy with distinctions between volunteers and purchasers, or to establish one rule for a gift to a parent or child, and another for a sale which is but a gift to the husband of the purchase money; for it can be of little value to the question, whether the consequence is eventually to put him in possession of the estate or the price of it. There was evidently no purpose to change the measure of the wife's protection under the original act; the object plainly being, to restore it to what was supposed to be the true construction of it, whether the transaction were a gift or a purchase, and not to assign a double meaning to the same words, by retaining the interpretation of the courts as to the one class of grantees and discarding it as to the other. The effect of a recital in the preamble of a statute was shown in *Seidenbender* v. *Charles*, 4 *Serg. & Rawle* 151, to be insufficient to control the enacting clause, unless to avoid an unexpected mischief or a monstrous injustice, neither of which is apparent here.

It is contended, however, that the act ought to be so construed as to exclude the present case, by reason of the judgment which had passed in a previous action for the defendants: and for this, reliance

is had on the decision in *Barnet* v. *Barnet*, 15 *Serg. & Rawle* 72, in which, however, no more was decided than that the abrogation of a rule which had made a different case, did not render a judgment erroneous pending the writ of error, which was free from error when it was rendered. Certainly the supplemental act was not intended to operate retrospectively on the regularity of judicial proceedings, its object being to affect the evidence of title; and it would have been strange had this court so construed it as to make that erroneous by relation, which had been done in pursuance of its own decision. The argument would be incontrovertible, if a judgment in ejectment were conclusive of the title; but the decision had regard to the right of possession, not as it appears now, but as it appeared then, when governed by a rule which no longer exists. In a second ejectment, the judgment is on the facts as they are presented, however modified by intervening rules of evidence, or the ability of the parties to produce new proof.

The constitutionality of the act presents a subject already exhausted. The question of its consistency with the constitution of the state, was put at rest by the decision in *Tate* v. *Stoolsfoos*, 16 *Serg. & Rawle* 35, and *Barnet* v. *Barnet*, already cited; nor would we have suffered it to be argued as regards the constitution of the United States, were it not intimated that the object of raising the point here, is to submit it to the court of the last resort. For myself, I am not one of those who perceive a constitutional blemish in every statute which impinges on existing rights, and who hold the enactment of it to be in contravention of the inherent principles of a written constitution. Retrospective laws are doubtless unjust in theory, and indefensible in practice, where they are not employed as a corrective of some intolerable mischief; but where the rights which they are intended to affect, are unguarded by a specific prohibition, the question of morality, as well as of policy, is for the determination of the legislature. Our inquiry, then, is a simple one—What are the specific limitations which are imposed on state legislation by the constitution of the United States? They are all contained in the tenth section of the first article; and but the inhibition of *ex post facto* laws, and laws impairing the obligation of contracts, can be made to operate on the subject of the present controversy even by the most strained construction.

Ex post facto laws are necessarily retrospective: they act on existing rights, or they do not act at all. Yet the converse does not hold; for it seems to be universally conceded, since the decision in *Calder* v. *Bull*, 3 *Dall.* 386, that retrospective laws are not necessarily *ex post facto* within the meaning of the constitution. In that case, the prohibition was held to be exclusively applicable to penal laws; such as would impart criminality to an act that was indifferent at the time, or increase the criminality of an offence already committed, or deprive a prisoner of a privilege or advantage in relation to the measure of the proof or the course of the trial. These are plainly forbidden.

But in matters of civil jurisprudence, statutes simply retrospective have not been disregarded by the courts, but for disobedience of some plain, palpable and positive mandate of the constitution. This was distinctly asserted by Mr Justice *Washington*, in delivering the judgment of the court in *Satterlee* v. *Matthewson*, 2 *Peters* 411, and shown to be entirely consistent with decisions that had been thought to bear the other way. In *Calder* v. *Bull*, a distinction was expressly taken between *ex post facto* and retrospective laws; the prohibition of the former being protective of the person, and the security of property being referable to the clauses which forbid a tender to be made in any thing but coin, or the sanctity of contracts to be violated. These clauses, it was justly remarked, would be redundant, were the prohibition of *ex post facto* laws so largely construed as to extend it to the protection of both person and property; as it would cover the whole subject. But taking that to be otherwise, the law in question carries with it no actual pretension of power to interfere with vested rights. The act of 1770 empowered the magistrate to make the separate examination, but omitted to declare what should be evidence of the fact. The practice has been to perpetuate it by the magistrate's certificate, in analogy to the direction of the act of 1715, and this court had thought itself bound by analogies from the case of a fine, to require the essential parts of the transaction to be specially set out, in default of which, it was held, not that the conveyance was void, but that the grantee had failed to produce the requisite proof of its execution. By interfering with the existing decisions, so far as to declare that a certificate of the fact of acknowledgement should be taken to import a compliance with all the requisitions of the law, the legislature undertook to deal, not with the contract, but the evidence of it. In what then had the party to be affected a vested right? If in nothing but the quality and effect of the evidence, his right was possessed of no peculiar sanctity. An act to change the rule which requires subscribing witnesses to be called, could not be said to affect a right, even so far as to incline a judge towards a construction favourable to an exemption from its operation of instruments in existence at the time of its enactment. It might be otherwise, were attestation by subscribing witnesses, as in the case of a will of land under the statute of frauds, an essential ingredient in the act of execution. Here, however, a specification of its ingredients was not an essential part of the acknowledgement, or of the separate examination, but a form and measure of proof, exacted, not by the legislature, but the courts; and in substituting a different one, the legislature dispensed with no part of the separate examination or acknowledgement, either in substance or in form; but in accordance with the common law maxim *omnia rite presumuntur*, declared a certificate of the naked fact of acknowledgement, to be at least *prima facie* evidence of every thing necessary to constitute the whole fact. I take it, then, the supplemental act divests no right, and that it might not be unconstitutional if it did.

Most of the preceding remarks are equally applicable to another branch of the argument, whose object has been to show the act to be in derogation of the contract. I pass without remark the notion, that it would impair the patent, which certainly is no less effective than it ever was to pass the title from the state. No contract can be impaired by it, but that which is the immediate subject of its operation. That it operates not on the title, but the evidence of it, I have attempted to show; and if even without success, it is still sufficient that its tendency is not to impair the contract, but affirm it. That it is one thing to annul a contract, and another to establish it, was determined in *Hess* v. *Wurts*, 4 *Serg. & Rawle* 356, in which a statute passed in maintenance of an action on the notes of certain unincorporated banks, was sustained, though the effect of it was to set up a contract which had been declared a nullity. And in *Satterlee* v. *Matthewson*, 16 *Serg. & Rawle* 169, a void lease was validated by a statute, which was determined to be constitutional, though operating in the particular instance on a case adjudicated. I rely on that case with peculiar confidence, not only because it is in all respects what the argument has assumed the case at bar to be, but because the decision of it has been affirmed in all its bearings, by the supreme court of the United States, where the distinction between the destruction and the establishment of a contract was taken and sustained. Even Mr Justice *Johnson*, who dissented as to that, concurred in maintaining the competency of the legislature to declare the law retrospectively, so as to revise and overrule the decisions of the judiciary, a principle broad enough to cover the whole case. After a decision of the very point in terms so positive, it is idle to pursue the inquiry; and I dismiss it to turn again to matters of domestic and exclusive jurisdiction.

Nothing can be more purely technical, than the exception to the record of the writ of error *coram vobis*. That the supposed clerical slip in recording the defendants' appearance deprived them of any protection or advantage they would otherwise have had, is not pretended, and the exception is therefore entitled to no peculiar favour. In the application of rules of practice, respect is to be had, not only to the general inadvertence of the profession to matters of this sort, but to the inexperience of the prothonotaries, which frequently compels us to dispense with the form, in order to preserve the substance of justice. Our records are seldom, if ever, put into form, and the evidence of our judicial proceedings is suffered to rest in minutes or short entries, which are in truth but the material from which a record is constructed elsewhere. In the case before us, the only evidence of an appearance at all, is the customary entry of the names of counsel in the margin of the docket; by which, however, the prothonotary would have been authorized to make up the record for the writ of error *coram vobis*, so as to show, according to the truth of the fact, that the infant defendants had actually appeared and made defence by their guardian, who was also a co-defendant; or the defect,

being a clerical one, might have been amended even after error brought. An application to amend, therefore, would have set the matter right, or the plaintiff instead of pleading specially to the assignment, might have put the truth of it in issue. Instead, however, of having recourse to the record for its substance and effect, he has put his case on the facts contained in the special plea. But these are precisely what might have been made to result from the record without pleading; the entry of the appearance, like the memorandum of a judgment, being in point of effect what it ought to be in point of form. The only question then is, whether this legal effect can be shown in a case like the present, by plea and averment. I know of no principle which forbids it, especially in a proceeding where an inference of error, depending on extrinsic facts, may be rebutted by other facts. Perhaps, after all, to plead specially was the better course. It is unnecessary to go into a more particular examination of this point, the bearing of the subject having been accurately explored by the judge who ruled the cause below, whose conclusions are sustained both by reason and authority.

The remaining errors require but a passing notice. It is impossible to discover why a verdict could not be rendered in favour of the surviving executor, and none has been shown. As to the notion that a verdict may be available for some purposes though set aside, it is sufficient to say that the act is applicable to none but a verdict which is final in the cause; else two verdicts in the same action, though set aside for misdirection or reversed by writ of error, would constitute an independent title at the third trial. It has also been suggested, that the defendants have acquired title by the statute of limitations. No part of the evidence is on our paper books, and we would therefore be unable to form an opinion on the subject, were it even proper to express one; but we could not in any event decide, as a matter in the cause, what was not the subject of decision below. A bill of exceptions removes not the whole cause for revision on the merits, but a specific point decided by the court and excepted to by the party. Defence was not taken on the statute of limitations, or at least no point in regard to it was made a subject of exception, and therefore none such is for inquiry here.

Judgment affirmed.

Bolton *against* Colder and Wilson.

A stage coach passing upon a public highway, is protected by an act of congress from wilful and wanton obstruction or delay; but in every other respect they are on a footing with all other carriages.

A traveller may use the middle or either side of a public road at his pleasure, and without being bound to turn aside for another travelling in the same direction, provided there be convenient room to pass on the one hand or on the other.

Parol proof of a particular custom should not be suffered to control the general law of the land.

THIS was an action of trespass on the case, against the defendants as the proprietors of the Reading and Harrisburg stage coach, tried before Mr Justice *Rogers*, at a circuit court for Dauphin county, the 16th of April 1833.

The plaintiff called *Henry Schantz*, who testified as follows:

I was a passenger in the stage on the 4th February 1832. Stopped at *Koon's* tavern, *Bolton* was before us, coming to Harrisburg; the stage overtook *Bolton*, he turned out to the left hand coming up; *Bolton* was riding in a dearborn wagon; *Philip Ressel*, the driver, drove against *Bolton's* wagon and upset it; he drove on about a quarter of a mile without stopping. We then got out of the stage; we told him to stop, that the man could not get out, he was lying in the wagon. *Nagle*, *Dubbs* and *Karch* went back; we took him out, righted his wagon and then put him in again. *Dubbs* got in with *Bolton*, and drove the wagon to Harrisburg. *Bolton* could not rise or help himself; appeared to suffer much pain; complained that his leg was broken. I was looking out of the stage, and saw all; *Bolton* had turned out as far as he could without upsetting himself, more than half the road, almost the whole road; *Philip* did not turn out at all; he struck the wheel of *Bolton;* the stage could have passed easily to the right. It was raining and snowing. I was looking out of the window of the stage to see how far *Bolton* was ahead of the stage; the hind wheel of the stage struck the wagon and turned it over; there was room enough for two stages to pass to the right of *Bolton's* wagon; *Philip* kept straight on without turning to either side; he drove the whole way at a pretty fast trot. It was on the turnpike from Harrisburg to Lebanon, about three miles from Harrisburg. When I looked out, *Bolton* was about four or five yards before the stage; *Nagle* and I looked out at the same time; stage not open before, the curtains were all down; three seats in the stage; I sat on the hind seat; *Bolton's* wagon was covered, don't know whether open or closed behind; I don't know that the stage horses were frightened; I can't say whether I went down the hill or up, after we left the stage to go back. We all told the driver to stop;

when I first saw *Bolton* he was on the left side of the road, the stage struck the hind wheel of *Bolton's* wagon.

We told *Philip* more than once to stop; cannot say whether he heard us; there was snow enough on the ground to mark the track of the stage and wagon, I looked at the tracks when we went back; we discovered that *Bolton's* wagon had turned out to the left and that the stage had not; we looked on purpose to see whether the stage had turned out, we went back four or five steps to see; from the tracks of *Bolton's* wagon we could see he was turning to the left all the while; we looked out of the stage on the side next to *Bolton; Bolton* could not have got up without assistance; it happened in the evening.

Doctor *T. Dean* proved as follows:

I was called to see Mr *Bolton* about the 3d or 4th of February. I found him sitting in his wagon; had not been removed; complained of very severe pains; directed him to be removed up stairs at *Henzey's;* found difficulty in getting him out of the wagon; found a fracture of the neck of the thigh bone; considered a difficult case; he was considerably bruised and complained of pain in the back; continued to visit him until the 1st of March following, I then ceased to make entries in my book; the bones were replaced; the apparatus had to be removed, owing to severe pain he complained of in the leg and back; severe constitutional diseases followed; high fever, pain in the head and inflammation of the kidneys; he had been subject to a chronic disease of the kidneys before. It has been a question whether a fracture in that part will ever unite, now settled that it may. He is now lame, and I think it probable he may continue to be a cripple through life [this testimony objected to by defendants' counsel—admitted and point reserved]. He will be subject to pain from changes of weather, this is the case in all fractures; it was necessary to administer large doses of opium to allay the pain. Mr *Bolton* was a very impatient man; I have an indistinct recollection of his discharging bloody urine. I think 60 dollars a moderate compensation for my services; he was a troublesome patient, sent for me often when not necessary, and often in the night time.

It is my opinion that a fracture of this bone may unite; I think in this case it has united; lameness is not a necessary consequence of a fracture of this kind; I have not seen Mr *Bolton* since I ceased to attend him; I observe he halts a little in his gait at present.

I have made an examination of Mr *Bolton's* leg this morning, and find it shortened by accurate measurement three fourths of an inch; the calf of the leg appears more swollen than the sound one.

The plaintiff then gave further evidence of these facts and closed.

The defendants then called *Philip Ressel,* the driver, who testified as follows.

I was the driver of the stage on that day from Hummelstown to Harrisburg; I stopped at *Kuhn's* to water; *Bolton* drove by; I then started and came up with him; when I came within thirty or forty

yards of him he looked back, he then kept on, and I went on at a regular gait until I got within fifteen or twenty yards of him, he then looked back a second time, gave his horse the whip, and run him the canter, still in the middle of the road; I turned out to the left, thought to pass him on the left, and let him have the middle of the road; when I got up fornent his wagon, he turned out of the middle of the road to the left side, to prevent me from passing; I was then obliged to pull the front horses' reins so as to turn them to the right, to pass him to the right; the hind wheel being in a rut slid along, and caught the tire of the hind wheel of the wagon and turned it over; the wagon turning over frightened my horses, and I could not check them until I got on the face of the hill, and was then obliged to go on to the top of the hill before I could stop. It happened at the foot of a hill. I then stopped, and told the passengers to go back and see whether the man was hurt; such an accident had never happened before; they went back, took him out of the wagon, and set it up. I could have passed to the left of Mr *Bolton* without any injury, if he had not turned in on me; the front wheels of the stage passed free of the wagon, may be two feet; just before the stage struck the wagon his horse made a kind of a halt. It was two hundred, or two hundred and fifty yards from the place where the wagon was upset to where I stopped the stage. I could not stop the horses on the hill with safety to the passengers. I did not hear the passengers call to me to stop.

I was employed by *Colder* and *Wilson;* I generally carry a horn; *Bolton* was in the middle of the road; there was as much room on the one side as on the other; when I found he was passing to the left, I bore up my horses as soon as I could. When I came to town I told Mr *Colder* of the accident; he told me I ought to go and see *Bolton*. I did not go. The passengers told me the same evening they thought his leg was broken. I told the manner it happened to Mr *Puffington* the same evening.

The defendants gave also some evidence of a special custom to regulate the passing of carriages on turnpike roads, &c.: when his honour summed up the evidence in pointed terms in favour of the plaintiff; and the jury found for the plaintiff 1200 dollars damages.

On appeal to the supreme court in bank, the cause was argued for the plaintiff, by *Fisher* and *Krause;* and for the defendants, by *Weidman* and *Norris*.

The opinion of the Court was delivered by

Gibson, C. J.—Among the reasons assigned for a new trial, there is but one which deserves to be noticed; and there is so little even in it, that were it not necessary to correct an apparent misapprehension on the subject of it, and in a matter of very general concern, it would not be made a subject of remark. The movement of carriages passing on our turnpike roads in *opposite* directions, is regulated by

special enactment; but there is no positive law to regulate the passing of those who are travelling in the *same* direction. The defendants gave evidence of its being a custom in the latter case, for the leading carriage to incline to the right, the other making the transit at the same time by the left; whence it was attempted to be shown, that the injury suffered by the plaintiff, had been occasioned by his own neglect of this custom, which was said to have acquired the consistence of a law, but which was very properly exploded by the court. Nothing should be more pertinaciously resisted, than these attempts to transfer the functions of the judge from the bench to the witness's stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules, whose existence, perhaps, they had no reason to suspect before they came to be applied to their rights. If the existence of a law be so obscure, as to be known to the constitutional expositors of it only through the evidence of witnesses, it is no extravagant assumption to take for granted, that the party to be affected was ignorant of it at the time when the knowledge of it would have been most material to him; and to try a man's actions by a rule with which he had not an opportunity to become acquainted beforehand, is the very worst species of tyranny. The probability of actual ignorance in respect to this particular custom, is greater than in respect to almost any other that can be imagined, as the traveller might reasonably suppose the whole law of the road to be comprised in the statutory admonition that meets the eye at every gate and bridge. The use of parol proof has been, to say the least, sufficiently extended by suffering it to control the private written laws which individuals establish between themselves for the regulation of their rights in particular transactions, without suffering it to control the general law of the land. The judge, therefore, did a valuable service to the stability of the law, by freeing the cause from a matter so entirely foreign to it. It remains, therefore, to be seen, whether the rule laid down by him is founded in the principles of justice and reason. It was not pretended that the mail coaches are entitled to precedence, or the enjoyment of any particular privileges. They are indeed protected by an act of congress from being wilfully and wantonly obstructed or delayed; but in every other respect they are on a footing with all other carriages; and it is right, perhaps, that it should be so. Experience proves, that the drivers of them are not the most eligible depositories of power; and there are few who have not to do with them, either as passengers or travellers. The public, consequently, has an important interest in having them, in common with the drivers of other carriages, held strictly to the measure of their rights; and this can be done only by making their employers sureties for their good conduct as far as the law permits, and liable for their acts. They are seldom of sufficient estate to respond in damages to any considerable extent; and to treat them as exclusively liable, would in most instances be a denial of redress. With these consid-

erations in view, the judge stated the law to be, that a traveller may use the middle, or either side of the road at his pleasure, and without being bound to turn aside for another travelling in the same direction, provided there be convenient room to pass on the one hand, or on the other: and why should it be otherwise? The law to regulate the deflection of those who are travelling in opposite directions, was designed for the specific case mentioned in it; the object being, to avoid, by a preconcerted movement, the collision which might otherwise ensue from the mutual misapprehension of intention, frequently observable between foot passengers. But this uncertainty is productive of no collision between carriages travelling in the same direction, and the principle of the enactment is, therefore, not to be extended to it. It is certainly but reasonable, that the traveller, to be accommodated, should be at the pains to give his carriage the proper direction to enable him to profit by his superior speed; and if there be convenient room to pass on any particular part of the road, he ought not to complain. If there be not, it is doubtless the duty of the other to afford it, on request made, by yielding him an equal share of the road, if that be adequate and practicable; if not, the object must be deferred till the parties arrive at ground more favourable to its accomplishment. Should the leading traveller refuse to comply, he would be answerable for it. But to effect the passage by a forcible collision with him, is not to be justified, redress being demandable only by due course of law. Conformably to this, it was impossible to doubt that the injury entitled the plaintiff to his action; and as it clearly appeared to have been the effect of negligence, the verdict was properly rendered for such damages as will probably induce the proprietors of mail coaches to take care that their drivers be more attentive to the rights of others for the future.

Judgment affirmed.

Boyd *against* Boyd.

The admission of irrelevant testimony by the circuit court is no cause for a new trial, unless it appears to have done an injury to the party.

Administrators who enter into a joint and several administration bond, and file a joint inventory, are jointly and severally liable for the whole amount of the personal property of the intestate.

Interest beyond the penalty of a bond may be recovered in a court of law in the shape of damages.

APPEAL from the circuit court of *Lancaster* county, held by Chief Justice *Gibson*.

This was an action of debt on a bond of *Amos Slaymaker* and *Henry F. Slaymaker*, executors of *James Boyd* deceased, against *James Boyd*, *John Boyd* and *Samuel Boyd*, administrators of *William Boyd*. A statement of the facts, other than that which is contained in the opinion of the court, is not necessary to the understanding of the principles decided.

Champneys and *Norris*, for appellants.
Montgomery and *Jenkins*, for appellees.

The opinion of the Court was delivered by

Rogers, J.—This was an action of debt on bond, in which the defendants relied on three grounds of defence: First. Want of assets. Second. That the testator agreed to release the bond and take Colonel *James Boyd*, the son of *William Boyd*, as a substitute for it. Thirdly. That the bond had been altered, in a material part, when in the possession of the plaintiffs, after it was executed and delivered.

The plaintiffs offered in evidence, a bond of *James Boyd* to *Samuel Boyd*, with this indorsement. "The within bond given to secure the judgment of a debt on bond, *due to the estate of James Boyd deceased*, for which the said *Samuel Boyd* is also liable, but which is the proper debt of the said *James Boyd*, amounting to about 2000 dollars." They also offered the record of a judgment, in the suit of *Jacob Reaper* v. *Samuel Boyd*. The record contains this entry: debt 1400 dollars—judgment entered the 3d of May 1825, on a "Bond, in the above penalty, on a judgment bond, dated the 1st of April 1825, conditioned for the payment of a certain bond or obligation, given by the late father of *Samuel Boyd*, to a certain *James Boyd* late deceased, for about 2200 dollars, including interest; and also conditioned that he shall keep the said *Jacob Reaper* free from all charges and costs, and shall pay all charges and expenses, &c." The evidence was opposed, because it was irrelevant; and this was the only ground on which the counsel relied at the trial, for although when the *bond* was offered, they requested the subscribing witnesses to

be called, yet when it was withdrawn and the record substituted for it, this objection was abandoned. This appears from the paper book, and also from the report of the Chief Justice, who tried the cause at the circuit. On a motion for a new trial, it has been repeatedly held, that the admission of irrelevant testimony is no cause of a rehearing, unless it appears to have worked manifest injury to the party. And this it is difficult to show, particularly when the judge before whom the cause was tried is satisfied with the verdict. It cannot be supposed, that the jury paid any attention to testimony which had no bearing on the issue trying. A motion for a new trial is an application to the sound discretion of the court, and is not governed by the strict technical rules applicable to a writ of error. And in this respect this mode of review, which is made with a knowledge of all the testimony, is supposed to have a decided advantage. To retry a cause when there is no injury to redress, would be not only useless, but vexatious and expensive. But let us examine whether the testimony *was* irrelevant. The defendants relied on want of assets; they also contended the testator had released the debt. The bond of *James Boyd* to *Samuel Boyd*, and also the judgment to *Reaper*, was evidence having some bearing on both facts. The weight of evidence is not material. The bond and judgment have direct reference to the debt on which suit is brought; and certainly furnish evidence, from which an argument may be drawn, that there was an existing debt due from the estate of *William Boyd* to *James Boyd;* that whatever arrangement may have been made as to the manner of payment between themselves, yet that the testator never relinquished his lien against the estate of the father. And this argument would derive additional weight from the fact, that it would be against probability that the testator, who had a lien on the whole estate of the father, would be willing to give up the claim, for the personal promise of the son, who had got but a part of the estates. But it is said that *Samuel Boyd* assumed the payment of the debt; that this was such a promise as would support an action by the executors, to whose use it would enure, and that this would be a bar of the suit. If this be so, it was evidence clearly in favour of the defendants, of which he cannot in justice complain. On the contrary, he should have desired the admission of the testimony, and have then prayed the direction of the court, that it was a bar to the plaintiff's demand. But the answer to this position is readily given. The bond was given without the concurrence of the plaintiff. He was no party to the arrangement. How then, can his rights be affected? And besides, even if it were done with his express assent, yet it would be an accumulative remedy; for there is no evidence to show, that the testator relinquished the claim against the estate of *William Boyd.*

This view of the case disposes of the objection to the admission of the plaintiff's testimony. It remains now to consider whether the court erred in rejecting the defendants' testimony. The defendants

offered to prove that at the time of the decease of *William Boyd*, *Samuel Boyd*, one of the defendants, was unmarried, and remained so for two years; during which time, he was a wagoner on the road. That the personal estate in the inventory, except the few articles admitted in his plea, passed into the hands of the other administrators, who transacted the business of the estate; and they further offered to show, that *they* were the *acting* administrators. The object of the evidence was to ascertain the assets which were actually received by *Samuel*, one of the administrators, with a view of fixing the amount of his liability. The defendants cannot insist, that where there are co-administrators, each is liable only to the amount which came to his hands. That this is true, in regard to executors, who give no bonds, and to trustees, is settled by a train of authorities which puts the law beyond dispute. But does this rule hold where letters of administration are granted to two or more jointly, where they enter into joint bonds and where they file a joint inventory? Letters of administration were granted by the register, to *James*, *John* and *Samuel Boyd*. They entered into a joint and several bond, with *James Hamilton* and *John Robinson* as sureties. The bond is on this condition, that *they*, the administrators, shall make or cause to be made a true and perfect inventory, &c., and on this further condition, that they well and truly administer the goods and chattels, and credits of the estate. The administrators filed a joint inventory of the goods and chattels belonging to the estate, amounting to 1713 dollars and 73 cents. The suit is brought against all the administrators, two of whom only were served with process; as *James Boyd*, one of the two served, is dead, the suit is prosecuted against *Samuel Boyd*. The defendants filed a special plea, of which I have searched in vain for a precedent. The case of *Harcourt* v. *Proud*, 1 *Saund.* 333, from which the plea appears to have been taken, bears no resemblance to the plea filed. That was the form of a plea, where the executor retained a portion of the assets, to satisfy a debt due to himself. Where an administrator has assets, but not sufficient to satisfy all the debts, he can proteet himself only by pleading a special *plene administravit* of all beyond a sum sufficient to satisfy debts of a higher nature, and to pay the other debts of equal degree, their *pro rata* proportion. *Shaw* v. *M'Cameron*, 11 *Serg. & Rawle* 256. And if no assets whatever came to his hands, the administrators would be protected by the plea of *plene administravit;* inasmuch as upon that issue, it lies on the plaintiffs to prove affirmatively, that the defendants had assets. And in proof of assets, the plaintiffs may give in evidence the inventory of the personal estate of the deceased; and when such evidence is given, it is sufficient to throw the *onus* on the executor or administrator, to show how he disposed of the goods and money specified in the inventory. The proper plea was *plene administravit;* and on the inventory being given in evidence, it was incumbent on *Samuel* to show the disposition which had been made of the property mentioned

in the inventory. But this he evades; and, instead, offers to show the property which came to his hands, with the additional fact, that his brothers, and not himself, were the acting administrators. If we suppose that *James* and *John* had committed a *devastavit*, and were insolvent, the effect of the testimony would be, on the grounds assumed in the argument, to throw the whole responsibility on the sureties. For the defendants' counsel contend, that the sureties are bound, that each administrator will well and truly administer the assets, which may be actually received by him; and that this is the extent of the liability of the administrators. They are unwilling to admit his liability even as surety. If, then, a suit is brought upon the administration bond, the co-administrator can be subjected only to the amount he has received, although the creditors may recover the value of all the assets, which come to the hands of all or either of the administrators, from the sureties. But the true rule is (and I am at a loss to see how a different construction can be given to the contract), that on a joint administration, the administrators become responsible for each other as principals. The sureties are bound, that they as principals, without regard to who is and who is not the acting administrator or recipient of the money, will faithfully administer the estate. A different view of the case would be not only against sound policy, but unjust. It frequently happens that sureties enter into the bond, on the faith of the administrator, who receives no part of the assets, in the reasonable expectation that he will personally attend to the management of the estate, that at any rate he will stand between them and loss. They cannot tell who will be the acting administrators. The presumption is, all will act, and on this supposition the sureties have a right to rely, as all are frequently interested in the estates. Indeed, when a different arrangement is made, it is a matter of convenience among themselves, sometimes unknown to sureties and creditors. If the estate is wasted, it is sometimes with the knowledge and frequently with the neglect of the co-administrators. At any rate, blame cannot be fairly imputed to the sureties or to creditors. What difference is it to them who received the money? The only inquiry in which they are interested is, as to the amount of the assets, and the faithful administration of them. If an administrator wishes to protect himself from liability as principal, he may do so by taking the precaution of entering into a separate bond. And this has been frequently done by careful and experienced practitioners, where one of the administrators, as is sometimes the case where the administration has been contested, has been unwilling to become bound, as a principal, for the acts of the other. In this view of the law, we are supported by *Babcock* v. *Hubbard*, 2 *Conn. Rep.* 536. It was there held, that executors who join in a bond to the judge of probate, become jointly liable as *principals* to indemnify the surety, for the default of one of them. *Babcock* v. *Hubbard* was the case of a suit brought by the surety in the bond against one of two executors. It was contended

that as the defendant had been personally guilty of no default or misconduct as executrix, she was not bound to indemnify the surety. The defendant said, that when one executor is liable, upon a probate bond, for the default of his co-executor, his liability is only that of a surety or guarantee. But this conclusion, says Justice *Gould*, is incorrect; for though the liability of each of the executors as parties to the bond, may, *as between themselves*, resemble that of a surety for his principal; yet as it regards the plaintiff, who is to every intent a mere surety, they must clearly be considered as joint *principals*. For principals in an obligation, as distinguished from sureties, are those of the obligors the performance of *whose duty* the obligation is given to secure. The result of this then is, that, except as between themselves, it is a matter of indifference, what amount of assets each has received. Each is bound for the others as a principal, so far as regards sureties, creditors or legatees.

The counsel of the plaintiff in error further complain of the instruction of the court in this, that interest might be given by the jury beyond the penalty of the bond. In this we perceive nothing of which *they* have a right to complain. This direction was only material as it related to the allegation that the bond had been altered by the plaintiff.

It has been repeatedly ruled that interest beyond the penalty of a bond may be recovered in a court of law in the shape of damages; and this has been so held in *Harris* v. *Clap*, 1 *Mass. Rep.* 308, even as against a surety. Whether in all cases interest may be given beyond the penalty on a bond for the payment of money, it is unnecessary to decide; but it is clear that interest may be allowed from the time of demand, or where there has been forbearance at the request of the defendant, or where, as here, the interest was given from the commencement of the suit. 2 *Stark. Rep.* 167; 3 *Caines's Rep.* 48; 3 *Wend.* 444; 2 *Dall.* 255; 3 *Bro. Cha. Rep.* 489; 9 *Cranch* 109; 1 *Atk.* 79; 2 *Gill & Johns.* 279, 280; 3 *Serg. & Rawle* 297; 5 *Johns. Cha. Rep.* 283; 6 *Johns. Cha. Rep.* 1, 452; 7 *Johns. Cha. Rep.* 17; 11 *Serg. & Rawle* 72.

The other reasons for a new trial have been but little pressed, and as, from a view of the whole case, it appears that justice has been done, we are of opinion that the judgment should be affirmed.

Judgment affirmed.

Trustees of Jacobs *against* Bull et al.

Jacobs *against* Bull et al.

A legacy to a child vested, but not charged on land, and payable with interest, by the terms of the will, at twenty-one, shall nevertheless be paid presently at the death of the child, should that event happen before the time of payment originally appointed. But where it is presumed from the circumstances and the condition of the estate, that the postponement was intended for the benefit of others, the time of payment will not be hastened by the death of the legatee. Nor will the payment be hastened by his death in any case when the legacy is charged upon land.

When the same individual is an executor of a will and also the trustee of a fund arising out of the estate of the testator, and receives money in contemplation of law as trustee, it is demandable from him in no other character.

APPEAL from the circuit court of *Lancaster* county.

These were two actions of *assumpsit* for money had and received, in which the facts were the same, and which were stated and agreed to be taken in the nature of a special verdict. In the first, *Levi Bull* and *Molton C. Rogers*, trustees of *Coleman Jacobs*, were plaintiffs; and *Levi Bull*, *William Coleman* and *Molton C. Rogers* were defendants. In the second, *Samuel F. Jacobs* by his guardian *Mary Jacobs*, was plaintiff; and *Levi Bull*, *William Coleman* and *Molton C. Rogers* were defendants.

The facts were thus stated, and questions raised in the first case.

Cyrus S. Jacobs, Esq. died on the 6th of May 1830, having made his last will and testament, which was on the 13th of May proved in due form of law, and letters testamentary granted by the register to *Levi Bull*, *Molton C. Rogers* and *William Coleman*, three of the executors named therein; *Samuel O. Jacobs* and *Coleman R. Jacobs* having previously renounced.

By the said will, *Cyrus Jacobs*, Esq. devised, *inter alia*, as follows, viz. "item, to my son, *Coleman R. Jacobs*, I will Whitehall plantation, and the woodland belonging to it, both deeded to me by *James Hopkins;* and five and three-fourths acres of church land, deeded to me by *Edward Davis;* these tracts is about two hundred and fifty-five acres, and the mills and land, about sixty-two acres, deeded to me by the *Newswanger* family; these several tracts is about three hundred and seventeen acres, be the same more or less, with all the improvements; and 32,000 dollars, to be paid in instalments of 2000 dollars a year, with interest, to him and his heirs. Now if my said son *Coleman* takes again to drink, I will that my executors, hereafter named, take the benefit of the law made for such cases, and to take the property out of his hands for the use of him and his family."

Coleman R. Jacobs and *Mary* his wife, by indenture duly executed,

acknowledged and recorded, bearing date the 12th July 1831, for the causes and considerations therein expressed, conveyed to *Levi Bull* and *Molton C. Rogers*, the plaintiffs in this action, certain real and personal estate to hold for the uses and upon the trusts in the said indenture specified and contained.

On the 13th of April 1833, *Coleman R. Jacobs* died intestate, leaving a widow, *Mary Jacobs*, and issue one child, a son, *Samuel F. Jacobs*, whose guardian is the said *Mary Jacobs*, by force of the appointment in the deed of 12th July 1831 contained.

On the 23d of April 1833, letters of administration on the estate of *Coleman R. Jacobs* deceased, were in due form of law granted to his brother *Samuel O. Jacobs*.

Of the 32,000 dollars bequeathed to *Coleman R. Jacobs*, by his father, the defendants, the executors of *Cyrus Jacobs*, Esq. have paid two instalments of 2000 dollars each, with interest, viz. 2000 dollars to *Coleman R. Jacobs*, and 2000 dollars to *Levi Bull* and *Molton C. Rogers*, his trustees, the plaintiffs in this suit.

There is now remaining in the hands of the defendants, executors of *Cyrus Jacobs*, Esq. the sum of 28,000 dollars.

Two questions are submitted for the decision of the court.

1. Can the defendants, the executors of *Cyrus Jacobs*, Esq. pay over to the legal representatives of *Coleman R. Jacobs*, at this time, the whole of said sum of 28,000 dollars, or must it be paid by them in annual instalments, as directed by the will?

2. Can the plaintiffs, the trustees of *Coleman R. Jacobs*, recover from the defendants, the executors of *Cyrus Jacobs*, Esq. in any event; or does the fund in their hands, or so much of it as, by the deed of the 12th of July 1831, is limited to the use of *Samuel F. Jacobs*, the son of the said *Coleman*, belong to him and become payable to his guardian, and the balance to *Mary Jacobs*, the widow of the said *Coleman*, agreeably to the provisions of said deed of 12th July 1831?

If the opinion of the court be in the affirmative, upon either of these questions, then judgment to be entered in favour of the plaintiffs, for such sum of money as the court may think them entitled to recover at this time, but if in the negative the judgment to be entered generally for the defendants.

Upon the 26th of April 1833, the court entered judgment in favour of the plaintiffs for the sum of 28,000 dollars.

Upon the same day, the defendants appealed to the supreme court, and assigned as their reason for the appeal, that the judgment of the circuit court ought to have been rendered in favour of the defendants and not of the plaintiffs.

In the second case the facts were the same, and the questions submitted to the court were—

1. Can the defendants, the executors of *Cyrus Jacobs*, Esq., pay over to the legal representatives of *Coleman R. Jacobs*, at this time,

the whole of said sum of 28,000 dollars, or must it be paid by them in annual instalments, as directed by the will?

2. Is the plaintiff entitled to recover from the defendants, the executors of *Cyrus Jacobs*, Esq. in any event, or does the fund in their hands belong to the trustees named in the deed of the 12th of July 1831, and become payable to them.

If the opinion of the court be in the affirmative upon either of these questions, then judgment to be entered in favour of the plaintiff for the sum fixed by the court, but if in the negative the judgment to be entered generally for the defendants.

Upon the 26th of April 1833, the court entered judgment in favour of the defendants.

Upon the same day, the plaintiff appealed to the supreme court, and assigned as his reason for the appeal, that the judgment of the circuit court ought to have been rendered in favour of the plaintiff for the damages claimed in the declaration, and not in favour of the defendants.

The questions were argued by *Jenkins* and *Montgomery*.

The opinion of the Court was delivered by

Gibson, C. J.—A legacy to a child vested, but not charged on land, and payable *with interest*, by the terms of the will, at twenty-one, shall nevertheless be paid presently at the death of the child, should that event happen before the time of payment originally appointed. The rule is laid down in Mr *Roper's Treatise*, vol. 1, p. 393, with references to the cases, but without a clear and precise exposition of the reason of it. The reason and the consequences, however, seem to be that, as the estate would not be increased by further postponement, interest being demandable in compensation of delay, and as the object of the testator, evidently having respect to the circumstances and condition of the legatee, would no longer be promoted by it, no beneficial purpose could be answered by carrying into effect an arrangement adapted to circumstances which no longer exist. And the reason seems to imply this distinction, that where the postponement is presumed, from circumstances peculiar to the child's condition, to have been intended for his personal benefit, payment shall be made as soon as it is ascertained by his death, that his benefit will no longer be promoted by it; but that where it is presumed from the circumstances and condition of the estate, to have been intended for the benefit of others, the time of payment shall not be hastened by his death. In accordance with this, we find that when less interest is directed to be paid, than the legacy would make in the lands of the executors, payment shall be deferred notwithstanding the death, in order to give the estate the benefit of the difference; and the same principle governs in respect to the payment of a legacy charged on land, the time being presumed to have been postponed for the convenience of the heir or devisee; as was held in

Feltham v. *Feltham*, 2 *P. Wms* 271. What then is the case stated? A father bequeaths a legacy of 32,000 dollars to his son, in annual instalments of 2000 dollars, *with interest on the principal*, and without charging it on land. It seems, therefore, to differ from the common case of payment at twenty-one, in nothing but the appointment of several days of payment instead of a single one. The clause empowering the executors to take possession of the real estate given, in addition to the legacy, in case the son should relapse into habits of inebriety, instead of making room for an exception, proves that the protraction of payment was intended to protect him from the temptation to squander incident to the possession of large sums of ready money, and brings the case more emphatically within the reason of the rule; to say the least, it cannot make a difference unfavourable to it. By the death of the son, then, the unexpended residue became presently payable to those who have succeeded to his rights; and whether by the executors to his trustees under the deed of assignment, or by the executors directly to the guardian of his infant, the party beneficially entitled under the deed, is all that remains to be determined. It is said that as the money is, in point of fact, as much in the hands of the executors as it is in those of the trustees, and as any further execution of the trust is rendered unnecessary by the death of him who created it, payment may be had from the executors without the intervention of the trustees. But as money can pass only by delivery, it must necessarily have been taken to have been in the hands of the two executors who had it in fact, in their character of trustees, in order to protect it from the subsequent debts of the legatee, against which it was the design of the trust to guard it; and having been received by them in contemplation of law as trustees, it is demandable from them in no other character. Whatever, then, may be the right of the guardian to possession of the fund, it can not be enforced in this action.

Judgment in each suit affirmed.

Arrison *against* The Commonwealth.

A bond given by executors, conditioned for the faithful discharge of their duties, in pursuance of an order of the orphan's court, was sued by one legatee in the name of the Commonwealth for his own use, and a judgment was obtained by award of arbitrators for the amount of the penalty with the right to take out execution for the amount of his damages; these damages were paid by the defendant, and the legatee entered satisfaction on the judgment. Held, that such satisfaction extended only to the interest of that legatee, and a *scire facias* may be issued upon the judgment to enable any other of the legatees to recover their legacy; and a legatee whose legacy did not become due until after the date of the judgment may also maintain a *scire facias* upon it.

Such a judgment is final and not interlocutory, and is a lien upon all the lands of the defendant in the county where it is rendered; but its lien is limited to five years by force of the act of 1798.

Another legatee having sued the same bond and obtained judgment for the penalty with the right to take out execution for the amount of his legacy: it was held that although the first suit, if it had been pleaded, would have been a bar to the second; yet the circumstance, of its having been paid, and satisfaction entered upon the record, did not in any way affect the judgment in the first suit, or the right of any legatee or party in interest to maintain a *scire facias* upon it.

After the lapse of five years from the rendition of the original judgment, lands which were originally bound by its lien are discharged.

A *scire facias* which does not properly recite the original judgment, will not continue its lien, although after the five years have elapsed the court permit the *scire facias* to be amended so as to recite it properly.

THE facts of this case were stated and considered in the nature of a special verdict, all of which are fully recited in the opinion of the court.

Porter, for plaintiff in error.
Hepburn, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—This case has been brought before us by a writ of error to the judges of the court of common pleas of Northampton county: where *The Commonwealth* for the use of *Rebecca Rhea* was plaintiff; and *Thomas M'Cracken* and *Dilman Kulb*, the plaintiffs in error, with *John Fulmer* and *John Hartzell*, were defendants. The three latter were warned, as terre tenants of some of the lands upon which it was claimed, that the judgment upon which the *scire facias* was sued out was a lien. The material facts, as set forth in a case stated by the parties in the nature of a special verdict, were: that two suits had been brought in the court of common pleas of Northampton county in the name of the Commonwealth to August term 1817, against *Jephthah Arrison*, *Thomas M'Cracken* and *John Nelson*; one, No. 112, for the use of *Samuel Rhea M'Kibbin* and *Ann M'Kibbin*, by their guardian *William M'Kibbin*, and the second, No. 113,

[Arrison v. The Commonwealth.]

for the use of *George Jones Rhea*, by his guardian *William Rhea*. Both suits were commenced upon the same bond, which had been given by *Jephthah Arrison*, one of the executors of the last will and testament of *Samuel Rhea* deceased, with *Thomas M'Cracken* and *John Nelson* as his sureties; conditioned for *Jephthah Arrison* and his co-executor *James Davison* "well and truly administering all the goods, chattels, rights and credits which were of the deceased at the time of his death, and which had or at any time afterwards should come to their hands, or that of any other for their use, according to the directions of the testament and last will of the deceased, &c."

The amount or penalty of the bond was 12,000 dollars, and given on the 28th of May 1817, in pursuance of a previous decree of the orphan's court of Northampton county, made upon the complaint of some of the legatees named in the will, that the executors were wasting and carrying off out of the state, from which they had removed themselves, the estate of the testator. These suits were instituted upon the bond by *William M'Kibbin* and *William Rhea*, for the use of their respective wards, to recover legacies coming to them under the will. On the 12th of November 1817, judgment by agreement of the parties was entered in each suit for "the penalty of the bond, with leave to take out execution after the 18th day of May then next following, for the sum of 788 dollars and 92 cents, the principal and interest due, together with the interest accruing and costs of suit." On the 3d of May 1820, *William M'Kibbin*, the guardian named in the first judgment, by his attorney in fact, *William Rhea*, entered on the record thereof, that he, as the "guardian of the plaintiff, had received full satisfaction of that judgment, as it respected their claim on the judgment in the above case."

Upon the 5th of June 1822, a *scire facias* was sued out, returnable to August term 1822, No. 37, said to be upon the judgment in the action No. 112 of August term 1817; but this writ of *scire facias* recited a judgment which never existed, and one altogether different from that which was entered in the suit No. 112 of August term 1817. The recital is, "whereas, the Commonwealth of Pennsylvania for the use of *Rebecca Rhea*, heretofore in our court of common pleas of the county of Northampton, to wit on the term of August 1817, before *Robert Porter*, esquire, and his associates, then our judges at Easton, by the consideration of the same court, recovered against *Jephthah Arrison*, *Thomas M'Cracken* and *John Nelson*, late of the said county, yeomen, as well a certain debt of 788 dollars and 92 cents, lawful money of Pennsylvania, which to the said Commonwealth, *for the use aforesaid*, in our said court were adjudged for her damages which she sustained by occasion of the detention of that debt; whereof the said *Jephthah Arrison*, *Thomas M'Cracken* and *John Nelson* are convict; as by the record and proceedings thereupon in our said court, before our judges at Easton, remaining, more fully appears." And then, after further reciting that five years had nearly expired since the said judgment was obtained, and that the lien on

said real estate of the defendants would be lost unless revived, it proceeds to direct the sheriff to warn the defendants in the usual form. To this writ the sheriff returned, that he had served it upon *M'Cracken* and *Nelson*, two of the defendants, and given notice to *Henry Smith*, terre tenant. Afterwards, on the 31st of August 1822, a judgment by default was entered for want of appearance. Upon this judgment, on the 26th of October following, a writ of *fieri facias* was sued out, and indorsed as follows. "Real debt due 1st April 1821, 170 dollars and 14 cents. Interest from 1st of April 1821 to 31st of August 1822, 14 dollars and 46 cents. Amount due 1st April 1822, 105 dollars and 10 cents. Interest from 1st of April 1822 to 31st August 1822, 2 dollars and 62 cents. In all, 292 dollars and 33 cents." A tract or lot of land, the property of *Jephthah Arrison*, was levied on under this writ, and afterwards sold, upon a writ of *venditioni exponas*, for 136 dollars. And again, on the 5th of April 1824, an *alias fieri facias* was sued out to April term 1824, for the residue; and by indorsement thereon, the sheriff was "directed to levy on the lands of the defendant, *John Nelson*, then in the hands and possession of *T. T. Culp*." The lands of *Nelson* were levied on, and the rents, issues and profits of them, beyond reprizes, were found by the inquest sufficient to pay the amount of the execution in seven years. Anterior to this, at April term 1823, in the court below, an amicable action, in the nature of a writ of *scire facias*, to ascertain the amount due to *John Rhea*, another legatee under the will, upon the judgment in the action of August term 1817, No. 112, was entered, but nothing more done in it.

After these proceedings were had, *Rebecca Rhea*, the widow of the testator, who claimed a certain annuity under the will, commenced this suit, in which the judgment is now brought up for review, by suing out a writ of *scire facias* for her use, to August term 1826, upon the judgment rendered for 12,000 dollars, in the suit No. 112, already stated, to August term 1817. In this writ, after reciting the judgment as it appears on the record, and the bond and condition thereof upon which it was given, and so much of the will of the testator as to show the annuity which was thereby directed to be paid to her by the executors out of the estate of the testator in their hands; the arrearages of the annuity accruing from the 1st of April 1822 to the 28th of November 1825, amounting in the whole to 397 dollars and 87 cents, are set forth; and the nonpayment of the same assigned as a breach. To this writ, which was put into the hands of the sheriff, he returned, that he had "made known to *Thomas M'Cracken*, one of the defendants, and to *Dilman Culp*, *John Fulmer* and *John Hartzell*, terre tenants; and *nihil* as to *Arrison* and *Nelson*." The land of which *Hartzell* was in possession, amounted to forty-one acres and sixty perches; and he claimed to be tenant of it in fee simple, by purchase from *Thomas M'Cracken*, one of the defendants, for the price of 1950 dollars; and by deed of

[Arrison v. The Commonwealth.]

conveyance founded upon this purchase, duly executed by *M'Cracken* and his wife to him, on the 26th of June 1819.

Fulmer was in possession of twenty-four acres and one hundred and forty perches, and held by a purchase of the same from *Margaret M'Cracken*, for the consideration of 600 dollars paid to her, who, by her deed dated 12th of May 1823, sold and conveyed the same to him, under a title derived from *Thomas M'Cracken* and his wife, who, on the 16th of June 1819, by their deed, for the consideration of 1200 dollars paid to them by her, sold and conveyed the same twenty-four acres and one hundred and forty perches to her in fee.

Dilman Culp or *Kulb* is in the possession of one hundred and forty-six acres and thirteen perches; and has become the tenant thereof in fee simple by purchase from *John Nelson*, one of the defendants in the original judgment, for the price of 1533 dollars and 75 cents, and holds the same by a deed of conveyance duly executed by *Nelson* and his wife, on the 10th day of April 1823. 500 dollars of the 1533 dollars and 75 cents, the consideration money inserted in the deed of conveyance, although acknowledged by the deed to have been paid, still remains unpaid by *Kulb* to *Nelson*. After the commencement of this suit, and while it was pending in the court below, a rule of the same was entered on the 1st of September 1827, to show cause why the writ of *scire facias* sued out, returnable to August term 1822, No. 37, should not be amended by the *præcipe* and record, so as to recite the sum for which the original judgment was entered; and on the day of November following, this rule was made absolute, and an amended writ of *scire facias* filed.

From these facts, the court below gave judgment in favour of *Fulmer* and *Hartzell*, two of the terre tenants; but against *M'Cracken* and the other tenant *Dilman Kulb*, who have sued out the writ of error in this case.

Four errors have been assigned, but three questions only are presented by them.

1st. Did the original judgment, entered in the suit No. 112, of August term 1817, for the penalty of 12,000 dollars, create a lien to that amount upon the real estate of the defendants lying within the county? And if it did, 2d. Has any act been done to extinguish it; or has it expired by force of the act of 1799, limiting the lien of judgments? And 3d. Had *Rebecca Rhea* a right to sue out the writ of *scire facias* in this case upon that judgment of 12,000 dollars arrearages of her annuity, which did not accrue and become payable until long after the judgment had been obtained?

As to the first question, this court is of opinion that the judgment entered for the penalty of the bond became a lien from its date, to the full extent of the penalty, or 12,000 dollars, upon the whole of the real estate of the defendants, which they then owned, lying within the county of Northampton.

Whether judgment entered for the penalty of a bond in such case

be a lien or not upon the real estate of the defendant, depends upon the character of the judgment, whether it be an *interlocutory* or a *final* judgment. If it be merely interlocutory, it is no lien; but if final, it is so upon all the lands of the defendant lying within the county at the time of entering it. See *Lewis* v. *Smith*, 2 *Serg. & Rawle* 161, opinion of Justice *Yeates*.

A bond, such as the one upon which this judgment of 12,000 dollars was entered, conditioned for the performance of several acts and things at different times, becomes forfeited as soon as the obligor fails or neglects to do the first act that is required by the condition of the bond to be performed; and the obligor is entitled, according to the principles of the common law, not only to sue upon the bond, but to recover a judgment and have execution for the whole amount of the penalty, if not paid. *Gainsford* v. *Griffith*, 1 *Saund.* 58, *note* (1).

After some time courts of equity interposed, and granted relief from the payment of the penalty: in some cases where it was large and the real injury trifling; and in all cases where the object of the penalty was to secure the payment of a less sum of money, which, if paid afterwards with interest, was considered in equity an adequate compensation for the injury which arose from the nonpayment of it according to the condition of the bond. See 1 *Fonb. Eq.* 151, *note* (a); 1 *Fonb. Eq.* 395 to 397; 1 *Saund.* 58, *note* (1). And before the statute of 8 and 9 *Will.* 30, *cap.* 2, came into operation, it was not competent for the plaintiff to assign, in an action of debt upon a bond with a condition for the performance of covenants or other collateral acts, more than one breach; for if he had, it would have been bad for duplicity; and, again, because the bond was forfeited as much by the breach of one covenant, or failure to perform one act, as of all the covenants or acts required to be done. 1 *Saund.* 58, *note* (1); *Manser's Case*, 2 *Co.* 4, where Sir *Edward Coke* cites, 21 *Ed.* 4, 6, *a*, *b*, for the first branch of this proposition. The judgment, then, which was given for the plaintiff, upon the bond for the penalty, was final and complete, whereby not only his right to recover, which is all that an interlocutory judgment established, but the amount, is fixed and ascertained, which gives to it the character of a final judgment, and makes it binding, to the full amount for which it is entered, upon the real estate of the defendant. Thus stood the case of a bond conditioned for the performance of covenants or of collateral acts, until the passage of 8 and 9 *Will.* 3, *cap.* 2, which has been adopted in this state, but has in no wise changed the nature or character of the judgment that is to be entered, which must still be for the amount of the penalty, the same as before the passage of the statute. By the eighth section of it, the judgment, which is entered for the whole penalty, is only to stand as a security for the damages actually sustained, which are to be assessed by the jury that shall try the cause; or in case of a judgment had upon demurrer or by default, it is also to be entered for the whole amount of the penalty, but to remain as a security for the damages actually sustained, which the plaintiff,

by suggesting the breaches upon the record, is entitled to have assigned under a writ of inquiry, the form of which is given in *Lilly's Entries* 608, 609. After this proceeding is had, if the damages and costs are not paid, the plaintiff may sue out an execution, which must be to levy the debt, that is, the penalty and costs recovered by the judgment; but on the execution there ought to be an indorsement to levy only the damages assessed for the breaches assigned. 1 *Saund.* 58, *note* (1). And *Sergeant Williams* further says in this note, which seems to put an end to all question on this point, that "the statute does not direct any *judgment to be entered for the damages assessed*, and for the costs upon the return of the inquisition by the judge; therefore it should seem there can only be *one judgment*, namely, the *old judgment for the debt* (that is, the penalty) and one shilling damages for the detention, and 40 shillings costs, together with the costs of increase." From this it appears that the only judgment which is entered in a suit upon such a bond, as well since the passage of the statute of 8 and 9 *Will.* 3, as before, is one for the whole penalty, nominal damages and the costs; and that no other is to be entered at any stage of the proceeding; and that for the amount of this judgment, which is for the penalty, the execution must be sued out in all cases, if taken out at all.

In addition to this, the statute expressly declares, that, notwithstanding the damages, costs and charges shall be fully paid, yet "in each case the *judgment shall remain as a further security*, to answer to the plaintiff such damages *as he may sustain by any other breach of covenant* contained in the same indenture, deed or writing; upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, his heirs, terre tenants, executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution should not be awarded upon the *said judgment*." Now, unless the judgment that is entered for the penalty be held to bind the real estate of the defendant, this clause of the statute, which directs that it shall remain as a further security, would be eluded, and rendered inoperative; for it is only by its becoming a lien upon his real estate that it can afford any real substantial security.

As to the second question, it has been contended, that the original judgment of 12,000 dollars was extinguished on the 3d day of May 1820, by the satisfaction which was then entered by the guardian of those who caused the suit to be instituted; but that was merely an entry of satisfaction for the damages which had been assigned, by the convention of the guardian and the defendants, as the amount or sum of money that was coming to his wards, and not a satisfaction of the judgment for the penalty. The party who entered that satisfaction, had no power to enter a satisfaction that would have extinguished the judgment for the penalty. So far only as he, or his wards for whom he was acting, had an interest in and a right to an execution upon it, to compel payment of the damages to which they were

entitled, he could satisfy it, but no further. The Commonwealth is the plaintiff in the judgment for the penalty, and a trustee for all concerned and interested in it; and no *cestui que use* can enter satisfaction that will extend beyond his own interest, although he may have commenced the suit and prosecuted it to a judgment for the penalty. Neither did the second judgment entered in the second suit, No. 113 of August term 1817, upon the same bond, for the same penalty, affect the judgment in No. 112 in any way whatever, nor prevent the proceeding upon it which is now under consideration, as has been suggested. But the first suit and judgment might have been pleaded against the maintenance of the second, which was altogether irregular; for only one judgment can be had on such a bond. The bond becomes merged in the first judgment, and no suit can be sustained upon it afterwards, except it be by statute, as in the cases of sheriff's and constable's office bonds with us, where it is directed otherwise. But it is the opinion of this court, that the lien created by the entry of the judgment for the penalty of the bond, in the suit No. 112, expired at the expiration of five years from the first day of the term of which it was entered, inasmuch as it was not revived and kept alive by issuing a *scire facias* within that time upon it, according to the directions of the act of assembly of 1798, limiting the liens of judgments.

The *scire facias* which was issued to August term 1822, No. 37, did not recite this judgment at all, and can not, therefore, be considered as coming within the provisions of the act. *Dilman Kulb* became a purchaser of the land in his possession, and received a deed of conveyance for it on the 10th of April 1823, when the five years had run and the judgment of 12,000 dollars had ceased to be a lien on it. The attempt that was made to amend the *scire facias* of 1822, can not avail. It shows, however, that in the opinion of the counsel who moved for it, as well as that of the court that granted it, that the writ was radically defective, and that the judgment entered on it was insufficient to preserve and continue the lien, without an amendment, which changed by far the most important feature of it. The rule asked for, was to amend the writ so as to make it accord with the *præcipe* that was given for the issuing of it, and the record of the judgment. Now it does not appear that the *scire facias* was variant in any particular from the *præcipe*. It was, therefore, not authorized by it. Beside this, it must be apparent to every intelligent mind, upon mature reflection, that it was out of all time to make such an amendment for the purpose of resuscitating a lien which was clearly dead. More than ten years had elapsed from the date of the original judgment, at the time when the amendment was applied for; and more than five years had run around from the date of the judgment entered in the *scire facias* which was amended. The lien of every judgment is limited by the act of assembly already mentioned to five years, unless revived by *scire facias* as therein directed. Now whether the lien of a judgment be kept alive and still in force, is a

question that can only be determined by an inspection of the record, and if that does not show it to be so, it is dead and gone. Then what would have been the answer of any mind familiar with such a subject, if this question had been put at the time the rule to amend was entered? It is scarcely possible to doubt but that the answer would have been, that the lien had expired, as more than five years had run after the date of the judgment, or the first day of the term of which it was entered, and no *scire facias* appearing upon the record to have been issued upon it to revive it. The application to amend the *scire facias* which was issued, proves that no such *scire facias* as was requisite for this purpose appeared of record, otherwise the application was unnecessary; but the very object of the amendment was to put such a *scire facias* upon record, because it did not appear there before. The lien then of this judgment of 12,000 dollars, which was entered on the 12th of November 1817, having been permitted to expire by the lapse of five years without issuing a *scire facias* upon it for the purpose of recovering it, *Dilman Kulb* stood a purchaser of his land in fee simple, discharged from the lien of this judgment; and the court below were therefore wrong in awarding execution of the judgment against the land which he had purchased of *John Nelson* one of the defendants. It is also equally clear that no execution upon this judgment could be awarded against *Kulb* on account of the 500 dollars, part of the purchase money which he still owed *Nelson* for the land, because these five hundred dollars were a debt merely, or *chose in action*, which *Nelson* had against *Kulb*, and do not appear to be even charged upon the land in any way; and can not be made the subject of execution.

As to any lien that may have existed under the judgment in the *scire facias* of August term 1822, No. 37, at the time *Kulb* purchased it, if any was created by it, it has been suffered to expire, five years having passed by without any attempt to revive it. Hence, it does not appear that there is any colour for charging *Rebecca Rhea's* claim upon the land of which *Kulb* is tenant in any way whatever.

With respect to the third question, we have seen already in that part of the statute of 8 and 9 *Will.* 3, *ch.* 2, which has been recited, that provision is expressly made for the assignment and recovery of damages which shall arise from breaches happening after the entry of the original judgment. That as often as such breaches shall take place, the plaintiff is thereby authorized and enabled to sue out a *scire facias* upon the judgment, suggesting the new breaches; and the damages for and on account thereof, are to be assessed in like manner as for the first in the original proceeding—in which no other judgment is necessary to be rendered than the usual one in a *scire facias*, of an *award of execution.* This, it may here be observed, shows also the *final* and definitive character of the judgment that is given in the first instance for the penalty of the bond.

In the note of Sergeant *Williams* so often referred to, 1 *Saund.* 58, *note* (1), all this is most explicitly declared and set forth; and like-

wise in *Tidd's Pract.* 1012, 1013. The commonwealth is and must be considered as the plaintiff in the court below, in all the proceedings that have been had upon the bond and judgment now under consideration, which brings the case completely within the provisions of the statute of 8 and 9 *Will.* 3, and makes the proceeding against *Thomas M'Cracken* perfectly regular and sustainable, to recover damages for breaches committed after the entry of the judgment for the penalty of the bond.

The judgment of the court below awarding execution against the land in the possession of *Dilman Kulb* is reversed, but the judgment against *Thomas M'Cracken* is affirmed.

Commonwealth *against* Beatty.

A remedy having been provided by statute, proceedings were instituted under it, but during their pendency the statute was repealed; held, that the remedy was thereby taken away; and any further proceeding to enforce it illegal.

CERTIORARI to the quarter sessions of *Dauphin* county.

At January sessions 1830, *George Beatty* and others presented their petitions to the court, praying the appointment of viewers to assess damages done to their lands by the construction of the Pennsylvania canal, in pursuance of the act of assembly of the 9th of April 1827; and the viewers were appointed. On the 6th of April 1830, an act was passed repealing the act of the 9th of April 1827, and providing another mode of proceeding to ascertain damages. In these cases the viewers met and made report, on the 16th of April 1830, in favour of the petitioners, which were subsequently confirmed by the court, and removed to this court by *certiorari*. The exception made here was, that the further proceedings according to the provisions of the act of 1827, after its repeal, were illegal.

Foster, for the commonwealth.
Elder, contra.

The opinion of the Court was delivered by

KENNEDY, J.—The records of the proceedings in these several cases were removed and certified into this court, in obedience to four several writs of *certiorari*, issued out of the same, directed to the quarter sessions of Dauphin county. From the records it appears that the defendants in error respectively presented their petitions to the court of quarter sessions of Dauphin county, at January sessions 1830, praying the appointment of viewers, according to the provisions of an act of assembly passed the 9th day of April 1827 enti-

tled "an act to provide for the further extension of the Pennsylvania canal," to view the lands described in their respective petitions, of which they alleged they were the owners; and complained that they were injured and damnified by reason of the said canal, which had been completed through the same, and to report the amount of the damages, if any, which they respectively had sustained. Viewers were accordingly appointed by the court, who, after having viewed the premises set forth in the respective petitions and recited in the orders of the court, made reports in favour of the complainants for damages in each case, dated in three of them on the 16th and in the fourth on the 17th of April 1830.

The last error or exception, which is considered fatal to the reports of the viewers and the proceedings thereon in these cases, is the only one upon which we shall give an opinion, it being unnecessary to notice the others.

This exception is, that an act of the legislature was passed the 6th of April 1830, a few days before the reports of the viewers were made, entitled "an act relative to the appointment of canal commissioners," which, among other things, took away all power and authority from the court of quarter sessions, and from the viewers, to act or do any thing whatever in such cases after that date.

By the fifth section of this last act, it is enacted, "that in cases where injury or damage *has been* done or *may be* done to private property, by reason of the Pennsylvania canal or railroad passing through the same, &c., it shall be the duty of the canal commissioners to ascertain, as nearly as may be in their power, the amount of damages actually sustained, and to make an offer of such sum to the person or persons aggrieved as they shall think reasonable, &c.; and if the same should not be accepted, &c." then the right of appeal to a board of appraisers, which the governor by the sixth section of the act was required to appoint immediately upon its being passed, is given, whose duty it shall be "justly and equitably to assess the damages sustained by such person, in the manner directed by the existing laws, whose determination thereon shall be final." By this act the power to assess the damages, as well for injuries done previously to its passage as subsequently, is expressly given to the canal commissioners; and in case the party aggrieved should not be satisfied with their offer, then the amount or sum to be *finally* determined by the board of appraisers: thus taking away all right to petition the court of quarter sessions of the county, and also all right in that court to appoint viewers, or even to approve the reports of viewers which had been made to them or might thereafter be made by viewers who had been appointed under the act of 1827 anterior to this last act of the 6th of April 1830. There is no saving clause contained in this last act providing for carrying on and completing the proceedings then commenced and still pending under the act of the 9th of April 1827, or any prior act for assessing damages; but by its terms it came into full operation immediately

after its passage, declaring in the close of the ninth and last section, that "so much of any act as is thereby altered or supplied is repealed." Neither can I believe that this is to be attributed to inadvertence or oversight on the part of the legislative body. On the contrary, I feel satisfied that it was so intended; for cases of damages are expressly mentioned in the close of the sixth section of this act, where it is "provided that nothing therein contained shall be construed to prevent the board of commissioners from compromising all cases of *damages then pending in court,*" showing demonstratively that cases such as these now before us were within their view, and not overlooked.

At the time the viewers assessed and reported the damages in these cases, it is clear, then, there was no law authorizing them to do so; nor was there any law in being at that time or afterwards which authorized or gave power to the court of quarter sessions to approve the reports or to confirm them in any way. All jurisdiction and authority of that court in such cases was repealed and taken away by the act of the 6th of April 1830: hence all the proceedings subsequent to that time, although done only for the purpose of finishing what had been previously and rightfully commenced, are irregular, and must be quashed. This conclusion seems to be in perfect accordance with reason, and is amply sustained by authority; see *Miller's case,* 1 *Bl. Rep.* 451; *S. C.* 3 *Burr.* 1456; and the proceedings in laying out a road under certain acts of assembly which were repealed before the proceeding was completed; 4 *Yeates* 392.

The proceedings in each of these cases are therefore quashed.

Gordon *against* Preston.

A corporation which, by its charter, is authorized to purchase in fee, or for any less estate, "all such lands, tenements and hereditaments, and estate, real and personal, as shall be necessary and convenient for them in the prosecution of their works; and the same to sell and dispose of at their pleasure:" has power to mortgage its real estate to secure the payment of a debt.

If a mortgage by a corporation be executed, not on a charter day, or day appointed by a by-law, but at a special meeting, convened without notice, written or verbal, to the directors who did not attend, it would be voidable by the corporation. But if no objection be made by the corporation, it will be deemed to have acquiesced in and ratified the proceeding.

A judgment creditor of a corporation cannot take advantage of such an irregularity in the execution of a mortgage by it, so as to defeat it, and entitle himself to the proceeds of the sale of the mortgaged premises.

The fact of a mortgage given for a greater sum than was due, will not avoid it, unless it be done with a fraudulent intent.

A mortgage by a corporation, executed by the members of the board of directors present, and acknowledged by them, and the seal of the corporation affixed, is a good execution and acknowledgement.

A corporator may sustain the relation of debtor or creditor in regard to the corporation, and in the latter receive a security.

Part of a conversation having been given in evidence by one party, the other is entitled to have the whole conversation from the same witness.

ERROR to the common pleas of *Lancaster* county.

This was a feigned issue directed by the court of common pleas to try the validity of a mortgage by the *President, Directors and Company for erecting a permanent bridge of the river Susquehannah at or near M'Call's Ferry*, to *Jonas Preston* and *Abraham Bailey*.

Daniel Gordon, the defendant in this issue, was a judgment creditor of the bridge company, and therefore interested to defeat the mortgage, by procuring a decision that it was invalid. His counsel, upon the trial of this issue, raised these points.

1. That the law creating the corporation did not authorize the company to raise money by mortgaging its real estate, which depended upon the construction of that part of the act of incorporation which is in these words: "and the said company is hereby authorized to purchase in fee, or for any less estate, all such lands, tenements and hereditaments, and estate real and personal, as shall be necessary and convenient for them in the prosecution of their works; and the same to sell and dispose of at their pleasure."

2. That the resolution of the directors, authorizing the execution of the mortgage, was not passed at a regular and legal meeting of the board; and that all the members had not notice of it. The facts on this subject were, that the resolution was passed, and the mortgage executed, at a special meeting convened for the purpose, at which a quorum was present, but one or more of the members had not notice and did not attend.

3. That the mortgage was given to secure a larger sum than was due. It was given for a larger sum than was due to *Preston* and *Bailey;* but it was to secure other just debts of the company, although the trust was not mentioned.

4. That the execution and acknowledgement of the mortgage was not legal. The facts were, that the mortgage was signed by all the directors present, and sealed with the seal of the corporation, and acknowledged by them.

5. That the mortgage was illegal, because the mortgagees were the president and treasurer of the company, and were present at the meeting of the board when the mortgage was authorized and executed. These facts were as stated.

6. The plaintiff in error also assigned for error the admission in evidence by the court, of the declarations of *Bailey*, one of the mortgagees. The defendant's counsel had asked a witness to give evidence of the declaration of *Bailey*, which he did; and the plaintiffs then asked the witness to state other parts of the same conversation: which was objected to, and the objection was overruled, and exception taken by the defendant.

The cause was argued in this court by

Champneys and *Norris*, for plaintiff in error.
Parke, for defendant in error.

The opinion of the Court was delivered by

Gibson, C. J.—The exceptions in this multifarious record may be arranged under the following heads: 1. The power of the company to mortgage: 2. The legality of the meeting at which the mortgage was executed: 3. The amount of the mortgage debt being greater than the sum due to the mortgagees: 4. The validity of the acknowledgement and recording: 5. The power of the directors to deal with the corporate property: 6. The competency of their declarations not made in a corporate meeting.

1. By the second section of the act of incorporation, the company was authorized to purchase in fee or for any less estate, "all such lands, tenements or hereditaments, and estate real and personal, as shall be necessary and convenient for them in the prosecution of their works; and the same to sell and *dispose of* at their pleasure." According to the principle of *Lancaster* v. *Dolan*, 1 *Rawle* 131, a power to sell includes a power to mortgage, even under the statute of uses, though strictly construed; and *a fortiori* it ought under a statutory grant which is to be beneficially construed in furtherance of the object. But the superadded words, "dispose of," which would otherwise be redundant, leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act, without regard to the mode of its operation; and, as a power to incumber, might be necessary to the prosecution of its works, it is not to be doubted that it was intended to be given.

2. On the other hand it is equally clear that the mortgage did not originally bind the corporation. It was executed not on a charter day, or a day appointed by a by-law, but at a special meeting convened without notice written or verbal to the directors who did not attend. When the day has not been fixed by other competent authority, this notice is indispensable to a legal convention for the transaction of even the ordinary business. But here an extraordinary act was to be performed; the hypothecation of the real estate; and there was, therefore, the greater reason that all the directors should be summoned. The board consisted of nine members, a bare majority of whom, being competent, assembled to perform the act; and hence it might happen in such a case, if no more were summoned, that the major part of this majority, being a third of the whole, would perform it in opposition to the will of the two-thirds. To prevent such a conjuncture, it is necessary to give at least an opportunity for an expression of the voices of all.

But can the act be impugned now? A corporation can contract but by its agents, general or special; and in pursuance of powers delegated specially by its grant to particular persons, or generally, by its charter, to the officers entrusted with its affairs. Hence, the members of this board stood in relation to it, as servants whose acts may be disaffirmed for defect of authority, but by their master. But the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent. Now the validity of this mortgage is unquestioned by the corporation even at this day, though its existence has all along been known to the corporate officers, whose duty it was to disavow it, had there been an intent to contest it. The corporation then being satisfied with it, who has a right to object? In the *Silver Lake Bank* v. *North*, 4 *Johns. Cha. Rep.* 373, it was supposed that the right of a bank to take a mortgage as a concurrent security, though prohibited by the charter, could be contested only by the state, in a direct proceeding to establish a forfeiture, and not collaterally by a stranger. In that case, the want of authority arose out of the provisions of the charter; in this, out of the negligence of the corporate officers: but the principle is broad enough to cover both, as it was thought that none but the parties to the act of delegation were competent to allege the existence of a defect in the authority. That the mortgagees were members of the board, cannot prejudice their title; for treating with the corporation as individuals, and consequently as strangers, they were not bound to inquire into the regularity of the convocation, or to know that some of the corporators had not been summoned. Appearing at the meeting to mingle in the business of it, not as agents of the corporation, but as parties treating adversely to its interests; they are presumed, as corporators, to know nothing which a stranger would not be bound to know. Then, granting the defendant, as a judgment creditor, to have succeeded to the rights

and capacity of the corporation, his succession did not occur till after more than eight months from the performance of the act, during all which time the corporation was silent, though the absent members had notice of the mortgage by the minutes. At the period of the defendant's succession, then, the time for objection had gone by, and if it had not, still even he was quiescent till about the time of awarding the issue, in which the validity of the mortgage is drawn into question. To disaffirm it now, when every opportunity of obtaining any other security is lost, would be unconscionable; and the act, therefore, though originally unauthorized, must be taken to have been subsequently ratified.

3. The circumstance that the amount included was more than what was demandable, if such were the fact, would not avoid the mortgage for the sum actually due. Such was deemed to be the law in *Irwin* v. *Tabb*, 17 *Serg. & Rawle* 319, and the cases there cited. But the mortgage was in fact given for the benefit of other creditors, whose debts are not disputed; and, though the trust is not expressed in the instrument, evidence was proper to explain the true nature of the transaction, and negative any imputation of actual fraud.

4. It does not appear that the seal of this corporation was confided to the custody of any particular officer. It was affixed to the mortgage by the corporators present as such, together with their signatures; and, as the statute requires the acknowledgement of the grantor, or proof of execution to be made by the subscribing witnesses, the latter is contended to be, from the nature of the case, alone practicable. But a corporation may appoint an attorney for that or any other purpose; and where the officers or members of the body are competent to affix the seal, it would be strange if they were not competent also to declare the fact, especially as it lies more immediately within the knowledge of those who performed the act, than it would be within the knowledge of a special attorney.

5. That a corporator may sustain the relation of debtor or creditor in regard to the corporation, and in the latter receive a security, is a proposition which requires not the aid of an argument; and here the existence of a meritorious debt is not disputed.

6. Declarations of *Bailey* to *M'Call* were first given in evidence by the defendant, and the plaintiffs were therefore entitled to all that was said by him. His admissions were material, not as a corporator, (for he was not a director, but the treasurer, and as such had nothing to do with the mortgage), but as a creditor, whose debt, among others, was secured by it; and it is a common rule, that a party cannot avail himself of a confession by selecting a particular part of it.

Neither in this, nor in any other part of the record, therefore, do we discover any error.

Judgment affirmed.

Morris *against* Phaler.

The bequest of a general power of disposal, carries the absolute property wherever a limited interest is not given; such power, being a principal attribute of ownership, necessarily implies the existence of it, wherever the implication is not rebutted by the bequest of a special interest inconsistent with it.

ERROR to the common pleas of *York* county.

This was an amicable action of debt by *Christian Phaler* against *Joseph Morris*, in which this special verdict was found.

On the 1st of November 1789, *John Shafer* made his will, by which he, among other things, devised to his wife *Christina* a house and half lot in the borough of York, to enjoy the same during her widowhood; and in case she should remain his widow during her life, then said house and lot to be sold after her death, and the one half of the money arising therefrom he bequeathed unto the heirs and assigns of his said wife. The said *John* afterwards died, and said will was duly proved and allowed.

On the 23d of June 1830, the said *Christina* made her will, by which she directs her executors to sell her real estate and to pay one-fourth of the proceeds of such sale to *Christian Phaler*, the plaintiff in this suit. The said *Christina* afterwards died, and her said will was duly proved and allowed. At her death she left no real estate; nor had she any when she made her will. She left a small amount of personal estate, which was not sufficient to pay her debts. She died indebted to the plaintiff in the sum of fifty-five dollars.

The defendant became the administrator with her will annexed, and administered her personal estate according to law, but nothing remains of it in his hands to be applied to the debt due to the plaintiff, unless one half of the balance heretofore mentioned can be so applied.

The defendant also became the administrator *de bonis non* with the will of said *John Shafer* annexed, and after the decease of said *Christina*, sold the house and half lot in which she had her widowhood, by the will of said *John* as aforesaid, and of the proceeds thereof he now has in his hands a balance, after deducting the necessary expenses, of 406 dollars and 25 cents.

The said *Christina* remained the widow of said *John Shafer* during her life.

If the one half of the proceeds of said house and lot be not by law, under the will of said *John*, made subject to the debts of said *Christina;* and the plaintiff be entitled under the wills of said *John* and *Christina* to the *one-fourth* of the *one half* of said proceeds: then judg-

ment to be given for the plaintiff in this case for 46 dollars and 54 cents.

But if the same be subject to the debts of said *Christina*, then judgment to be given for plaintiff for 35 dollars and 63 cents, otherwise judgment for defendant.

The court below rendered a judgment for the plaintiff for 35 dollars and 63 cents.

Evans, for plaintiff in error cited, 3 *Binn.* 160; 2 *Cruise* 16, *ch.* 1, *pl.* 39; *Sugd. Pow.* 359; 4 *Kent. Com.* 328.

Anderson, for defendant in error, cited, 2 *Bl. Com.* 381, *note.*

The opinion of the Court was delivered by

Gibson, C. J.—This case falls distinctly within a familiar principle. It is an undoubted rule that the bequest of a general power of disposal, carries the absolute property wherever a limited interest is not given. And the reason for it seems to be, that such a power, being a principal attribute of ownership, necessarily implies the existence of it wherever the implication is not rebutted by the bequest of a special interest inconsistent with it. The rule is well established by *Maskeyline* v. *Maskeyline*, *Amb.* 750, and *Namnock* v. *Horton*, 7 *Ves.* 392; and is particularly illustrated by *Robinson* v. *Dusgale*, 2 *Vern.* 181, a case closely resembling the present. There the testator having devised his land for life to B, remainder in fee to C on condition that he pay 400 pounds, of which he directed 200 pounds to be at the disposal of his wife by her will; it was decreed to her administrator on the ground that it had vested in her absolutely in her life time. Now what is the case before us? The testator devised to his wife a house and half lot of ground during her widowhood; together with a shop and other half lot of ground in fee. But in case she should marry, he ordered the house and half lot to be sold, and one half the proceeds to be given her absolutely; an arrangement which, as she remained a widow till her death, it is unnecessary to notice further than as it indicates an intent that she should have a disposable interest in the money on the happening of either contingency. For the actual event, he provided thus: "in case my said wife shall remain a widow during life, then I order my house to be sold as aforesaid, immediately after her decease; and the one half of the money arising therefrom, I give and bequeath to the heirs and *assigns* of my said wife." It is plain from the context, if not from the word "assigns," that she was to have power to dispose of a moiety at her death. Long subsequent to the date of her husband's will, she made her own, directing her debts to be paid out of her personal estate, her real estate to be sold by her executor, and a fourth of the proceeds to be given to the plaintiff. It has been taken for granted that this devise of her real estate, passed whatever interest she may have had in the proceeds of the house; and such undoubtedly was her intent,

for at this time she had neither real estate nor any thing that savoured of it but her supposed interest in the price of this property; and without allowing her will to operate on it, it can not operate at all. The defendant, her administrator with the will annexed, and also the administrator *de bonis non* of her husband with his will annexed, administered her personal estate according to law, no part of which remains in his hands to satisfy the plaintiff, who is also a creditor; and he sold the house and half lot of ground in which she had her widowhood, the proceeds of which are in contest. If the plaintiff can take as a legatee but exclusively under *her* will, there will be nothing to answer his legacy, and he will have to come in as a creditor *pari passu;* but if he can take as her appointee, under her *husband's* will, he will come in as a legatee of the husband, and consequently by a title paramount to that of the widow or her creditors. Now to measure this case by *Robinson* v. *Dusgale*, which it resembles: we have the devise of a freehold to the widow, with a superadded power to dispose of what? Not the freehold, but an entirely different thing—the value of the fee simple in cash. This cash had not the remotest connexion with the freehold that preceded it, being essentially a different *corpus* and the product of a different estate, in which no limited interest had been given to the widow, the price of the fee not being the price of her freehold, which had been consumed in the enjoyment of it. We have then precisely the case of *Robinson* v. *Dusgale*, except that the wife might there have possibly come into the actual receipt and fruition of the money in her life time, and that here she could not. I see no difficulty, however, in that, or in supposing the incidents of a precedent ownership to exist after death, in relation to property from the enjoyment of which the owner was precluded in his life time. Why should the vesting of the title be thought inconsistent with a restriction of the use? A chattel may undoubtedly be given on condition of forbearance to use it for a day or a month; and if for a limited time, why not for life? The donee may in fact derive a valuable benefit from a gift thus limited, by being enabled to use his actual income the more freely, at least to the extent of the gift, being to that extent made secure of a fund for payment of his debts, or a provision for his family. It would seem to me, therefore, that the title to half the price of this property was in the widow during her life; and that it was subject to her debts at her death.

Judgment affirmed.

Peifer *against* Landis.

Part performance of a parol contract for the sale of land is essential to its validity.

THIS was an action of ejectment in the circuit court of *Dauphin* county, tried by Justice *Rogers*, in which *John Peifer* and *Sarah* his wife were plaintiffs, and *Christian Landis* and others were defendants.

The plaintiffs claimed the land by virtue of a parol contract, entered into between *George Bower*, and *Sarah Bower* the wife of the plaintiff. The plaintiffs to maintain the issue on their part, offered to prove, that *George Bower*, with whom the contract was made, lived in Derry township, Dauphin county, and in the fall of 1825 or spring of 1826, requested the brother of *Sarah Bower*, one of the plaintiffs, to send said *Sarah Bower*, who lived in Franklin county, to his house to live with him and take care of him in his old days. That the said *Sarah* refused to go, but insisted upon going with her father's family to Ohio; but was prevailed upon finally, by a brother, to go and live with *George Bower*, who was her uncle. That she came to live with *George Bower*, on a piece of land adjoining the land in dispute, in the fall of 1826. That after she came to his house, *George Bower* purchased the land in dispute, and came into his house with the deed for this land; said he had bought this farm, and upon being asked by *Sarah*, why he bought it, when he had so many farms, he said, "I bought it for you, if you will stay with me as long as I live." That *George Bower* told the tenants on the land and many other persons, that he intended to give that tract of land to *Sally Bower*, if she lived with him and took care of him as long as he lived; and after his death she might do with it whatever she pleased. That afterwards the said *Sarah Bower* was going to leave *George Bower*, and wanted to go home, and he told her he did not want her to go away, and that if she would stay with him as long as he lived, he would give her this farm, the one in dispute; and that, in consequence of said promise of *George Bower*, she remained with him, nursed him, worked for him, and served him faithfully until the day of his death. That if the said *George* had not made the parol promise, she would have left him at the time at which she threatened to leave him. That she then, in consideration of the promise, remained with the said *George Bower*, and did all his work and took care of him, in pursuance of her part of the contract, until the day of his death. That the said *George* made no will, nor did he comply in any manner with his part of the contract. That both plaintiffs and defendants in this suit claim under the said *George*

Bower, who was seised in fee, and possessed of said tract of land at the time of his death. That the said *George Bower* died possessed of a very large real and personal estate, and left at the time of his death but one child; and that the said *George* often told the said *Sarah* and his neighbours, that he would do as much for her as for his own child.

This evidence was objected to by the defendants and rejected by the court; when the plaintiffs took a nonsuit, which they afterwards moved to take off, and which was refused, and they appealed.

Alricks and *Weidman*, for appellants.

PER CURIAM.—There is no pretence of parol performance here, because there is no pretence of delivery of possession in pursuance of the contract; which is essential. The evidence, therefore, was properly rejected.

Judgment affirmed.

Fricker's Appeal.

Land purchased by a sheriff, after he enters into his official recognizance, is not bound by that recognizance, but if judgment is obtained upon it, after he acquires such land, the land is bound by the judgment.

The lien of a judgment opened to let the defendant into a defence, "the judgment to remain as security," was not lost by the lapse of five years from its entry, before the act of the 26th of March 1827, although the entry of the rule and order of the court opening the judgment, be made on the execution docket, to the entry of the execution which had issued on such judgment.

The act of the 26th of March 1827 requires a *scire facias* to be issued to preserve the lien in such case, and the lien, since that act, would not be preserved by a rule tying up the proceedings.

Where a judgment opened to let a defendant into a defence is not brought to trial within a reasonable time, and the defendant's real estate has been sold by the sheriff, and the money is in court for distribution, the court ought to permit the judgment creditor, who would be next entitled to the money, to appear as defendant, and rule the plaintiff to a trial.

APPEAL from the decree of the court of common pleas of *Berks* county, in the distribution of the moneys raised by the sale of the real estate of *John Miller*, a former sheriff of that county. *John Miller* having been duly elected sheriff, on the 20th of October 1817 entered into bond and executed a recognizance according to law. To January term 1830, a writ of *venditioni exponas* issued against him, on which his real estate was sold, and the money arising therefrom paid into court by the then sheriff: to wit, 1132 dollars, arising from real estate of which the said *John Miller* was seised and possessed before, and at the execution of said recognizance; and 475 dol-

lars and 3 cents, arising from real estate which the said *John Miller* acquired after the execution and date of said recognizance.

On *Miller's* official recognizance, a *scire facias*, for the use of *Gabriel Heister*, issued to November term 1823, on which, on the 14th of November 1827, a judgment for 1053 dollars and 17 cents was entered, upon an award of arbitrators. This judgment was entered after he became the owner of the real estate acquired by him subsequently to the execution of the recognizance. The *Bank of Pennsylvania* obtained a judgment against *Miller* on the 11th of November 1822, on which a *fieri facias* was issued to January term 1823; nothing was done by the sheriff on this writ; and on the 16th of January 1823, a rule was obtained to show cause why the defendant should not be let into a defence under this judgment, "proceedings stayed in the mean time." This rule, on the 26th of March 1823, was made absolute, "judgment and execution to remain as securities." The entry of these rules was made in the execution docket, and the trial of the issue directed had not been had; but to April term 1830, a *scire facias* to continue the lien of this judgment was issued, and returned *scire feci*.

William Fricker had judgments entered after the bank's judgment, which had been regularly revived.

The court of common pleas decreed: that the sum of 1132 dollars, money arising from the real estate owned by *John Miller* before the date of said recognizance, be applied in payment of *Gabriel Heister's* judgment; and that the sum of 475 dollars and 3 cents, arising from the real estate acquired by said *John Miller* after the date of said recognizance, be applied to the *Bank of Pennsylvania's* judgment.

The cause was argued by *Baird* and *Smith*, for the appellant, who referred to *Black* v. *Dobson*, 11 *Serg. & Rawle* 94; *Pennock* v. *Hart*, 8 *Serg. & Rawle* 369; *Bombay* v. *Boyer*, 14 *Serg. & Rawle* 253; 1 *Penns. Rep.* 129, 134, 481.

Biddle, for the appellee.

The opinion of the Court was delivered by

Huston, J.—When *John Miller* was elected sheriff of Berks county he was the owner of certain lands, all of which were bound by the recognizance then entered into by him by the provisions of the act of the 28th of March 1803. It has been decided that a judgment does not in this state bind after-purchased lands, unless levied on while in debtor's hands; but that if he sells them to an innocent purchaser before levy, such purchaser holds them clear of the lien. Whether the principle of that decision would embrace this case is not material, because *Heister* sued a *scire facias* on that recognizance and presented it to judgment, which judgment bound all lands which were the property of *Miller* at the date of that judg-

ment, although not bound by the recognizance as having been purchased after its date. *Heister* is then entitled to the whole of his judgment up to the time of the return of the sheriff's sale, that is to 1191 dollars and 8 cents; for all the lands sold were *Miller's* before the judgment on the *scire facias*.

The Bank of Pennsylvania had the next judgment, viz. of the 11th of November 1822, and *fieri facias* issued to 7th January 1823. On the return day of this *fieri facias*, a motion was made to open their judgment and let the defendant into a defence; a rule to show cause was entered, and made absolute on the 26th of March 1823; the judgment and execution to remain as securities. It would seem nothing has been done in this trial thus ordered; but under the act of 1827, and its supplement of the 26th of March 1829, a *scire facias* was duly issued to show cause why the lien should not be continued five years. The question is, whether the lien was not lost before that *scire facias* issued in 1830? because more than five years had elapsed from the date of the judgment, on the 11th of November 1822; and because the *fieri facias* on the rule to open the judgment had been returned not executed. By the law, a rule to stay proceedings for one purpose, stays the proceedings for all purposes; and this would, independently of any settled rule, be the case where they are stayed for the purpose of ascertaining the amount really due. The act of the 26th of March 1827, has, however, established one exception to this: in section third, it is enacted, that "no order or rule of court, or any other process or proceeding thereon, shall have the effect of obviating the necessity of a revival in the manner herein prescribed." This seems to recognize, that theretofore an order or rule of court might have had that effect. That law was made to confine the continuance of liens thereafter to the strict letter of the act of assembly. The second section also recognizes that judgment had before that time been kept in force by a liberal construction in favour of their liens. We are of opinion, then, that, although since the act of 1827 the lien would not be preserved by a rule tying up the proceedings in a judgment issued, yet before that it would have been, and that the judgment of the common pleas was right.

It has been objected that this motion and rule to stay proceedings, were entered under entry of this execution in the execution docket, and not as the entry of the original action in the appearance docket. Where no execution has issued, such motion and rule would be entered to the suit in the continuance docket. Where an execution has issued, and one object of the motion is to stay the proceedings on the execution, the motion and rule are often entered in the execution docket; perhaps, in some counties, it is generally so entered. It is true, when the issue is formed, and a trial had, the whole would be transferred to the appearance and continuance docket. It was said, the execution docket was no part of the record; but this, I think, was said without reflection: the discharge of the debt by levy and sale

appears on that docket; and if the money is paid after execution, and without a sale, that appears generally, if not always, on the execution docket. On that docket, the plaintiff, or his attorney writes the satisfaction: and we find it said, that the writ, new pleas and executions are the record; and we find it said, that the docket is the record; both assertions are partially true—they are both together the whole record. The pleas are not found except on the docket, in most cases; the judgment is found only on the docket; and I have said, satisfaction is generally only found there. The rules to take depositions, and every other rule in the progress of the cause, are found on some of the dockets. It is true, the execution itself, where the party claims or defends under some act of the officer under it, must be produced if possible; if lost, we produce the docket instead of it.

This is not like the case of *Black* v. *Dobson*, or any case of a judgment bond entered up by the plaintiff, who is bound, by positive enactment, to make his entries effecting that judgment, in a proper place. It is the act of the court, in tying up this judgment, and we should make sad work if all the entries in the execution docket were declared apocryphal. All proceedings after judgment are to be found, in ninety-nine cases out of a hundred, in that docket.

It would seem the issue directed between the *Bank* and *Miller*, is not yet tried. The money can not be kept locked up for ever. If the parties do not proceed to trial, the court ought to permit *Fricker*, who is next entitled to the money, to appear as defendant, and rule plaintiff to a trial.

Judgment for *Heister*, for 1191 dollars and 8 cents; and affirmed for the rest.

Whitehill *against* The Bank.

The want of an *affidavit* by the appellant, in the case of a decree distributing the proceeds of a sheriff's sale of land, is fatal to the *appeal*. An *affidavit* by his attorney and agent will not do.

APPEAL from the court of common pleas of *Dauphin* county.

That court, on the 8th of September 1829, made a decree distributing the money raised by the sale of the real estate of *Richard M. Crain*, from which *Whitehill* appealed, and his attorney made the *affidavit* that the appeal was not taken for delay. This appeal was entered in this court to May term 1830, and now, the 9th of May 1832, *Elder* moved to quash the appeal.

Elder, for the motion.

The *affidavit* must be by the party. Such an *affidavit* is filed,

but made long out of time; it is dated the 13th of January 1832, and filed the 30th of the same month, nearly two years after the appeal was in this court. An *affidavit* by counsel is insufficient. *Purd. Dig.* 268; 1 *Penns. Rep.* 421.

An appeal does not lie when facts are in dispute. These are to be tried by jury.

M'Cormick and *Douglass*, attorney-general, contra.

A new recognizance is allowed after an appeal is taken, and why not a new *affidavit*? 13 *Serg. & Rawle* 104. The motion ought to have been made at the first court; it is now too late, nor is an *affidavit* necessary. *Purd. Dig.* 619 (*Edit.* 1824).

PER CURIAM.—The want of an *affidavit* by the appellant is fatal. Appeal quashed.

Ebright *against* The Bank.

A judgment the lien of which was preserved by execution and levy on land at the time of the passage of the acts of the 26th of March 1827 and the 23d of March 1829, is required by those acts to be revived within the term of one year from the date of the latter act; and if not revived in that time, the lien expires; and this, although execution was out upon it at the time, and a sale made of the land in six days only after the term in the act had expired.

Where judgment is obtained against one who had taken the benefit of the insolvent laws, after his discharge, and a sale is made of land which was his when he was discharged, under such judgment the sale is only of what interest, if any, that remained in him, and the judgment creditor, and not his assignee or trustee, is entitled to the proceeds of the sale.

APPEAL from the decree of the court of common pleas of *Dauphin* county, distributing the proceeds raised by a sheriff's sale of the real estate of *Henry Meck*.

The money was claimed by *Jacob Meck* on the judgment of *Jacob Ebright's* administrators, against *Henry Meck* and *Jacob Meck*, which *Jacob*, who was the surety of *Henry*, had paid, and the court had ordered it to be marked for his use. The judgment was entered on the 25th of June, with a stay of execution to the 1st of December 1817; a *fieri facias* issued upon it to February term 1818, which was levied on the land which was afterwards sold. A *venditioni exponas* issued to October term 1818, which was returned stayed by plaintiff's attorney, and an *alias venditioni exponas* issued to April term 1830, on which, on the 29th of March 1830, the land levied on was sold for 251 dollars. The money was also claimed on two judgments of the *Philadelphia Bank* against *Henry Meck*, obtained on the 8th day of December 1817, revived by *scire facias* on the 27th of November 1826.

[Ebright v. The Bank.]

On the 13th of August 1817, *Henry Meck* was discharged under the insolvent law by the court of common pleas of Dauphin county; but no formal assignment was made by him to the trustees appointed by the court, and the trustees had not given bond.

The court of common pleas decreed the money to the *Harrisburg Bank*, which is the owner of the two judgments in favour of the *Philadelphia Bank;* and *Jacob Meck* appealed.

Elder, for the appellant.

The term of two years was allowed by the act of the 26th of March 1827, within which to revive judgments, the liens of which had been continued by previous laws, without suing out a *scire facias*. The act of the 23d of March 1829, extended the time for one year from the date of that act. *Purd. Dig.* 422, 423. The sale having been made on the 29th of March 1830, the time allowed by the last act had expired six days when the sale was made. But he contended that the case was not within the spirit of these acts, as the judgment was at the time working its own satisfaction, and great and unnecessary inconvenience would have resulted from requiring the party in such circumstances to issue a *scire facias*. He referred to 13 *Serg. & Rawle* 144.

But if the court should be of opinion that this judgment had lost its lien, he contended that the proceeds of the sale must go to the the trustees or assignees of *Meck*, under the insolvent laws, as the bank judgments were obtained after his discharge; and referred to *Gray* v. *Hill*, 10 *Serg. & Rawle* 436.

Shock, for the appellee.

The act of assembly is positive in its terms, and admits of no construction, by which its plain letter can be avoided.

He contended, however, that it was immaterial whether the property of *Henry Meck* in the bond sold was divested by his discharge as an insolvent or not. That was a question which concerned the purchaser at sheriff sale only. The bank judgments were obtained against, and bound whatever interest *Meck* had in the bond; it was that only which was sold, and the proceeds for which were in court. His assignees, whatever claim they might have to the land, had no claim to the money. *Friedly* v. *Sheetz*, 9 *Serg. & Rawle* 156.

The opinion of the Court was delivered by

Rogers, J.—It is notorious, that the liberal construction which the courts gave to the act of 1798, in *Young* v. *Taylor*, 2 *Binn.* 218; *Pennock* v. *Hart*, 8 *Serg. & Rawle* 369; and *The Commonwealth for the use of Pennock's Executors* v. *M'Kerper*, 13 *Serg. & Rawle* 144; was the principal cause which gave rise to the supplement, passed the 20th of March 1827. In language which it is difficult to misapprehend, the legislature have made a *scire facias* necessary, in all cases where such a writ can issue. We have only to inquire, whether

a *scire facias* may have issued to continue the lien; and I can see no legal objection to issuing such a writ, although the plaintiff may have proceeded to levy on the defendant's property, whether real or personal. The words of the first section are sufficiently comprehensive, to cover the whole ground. No judgment shall continue a lien on real estate for a longer period than five years from which the judgment may be entered or rendered, unless revived by agreement of the parties, or a writ of *scire facias* to renew the same be sued out, notwithstanding an execution may have been issued within a year and a day. And to make the meaning still more certain, in the third section the legislature says, that no order or rule of court, or any other process or proceeding thereof, shall have the effect of obviating the necessity of the revival of the judgment in the manner described. That some inconvenience may arise in a literal compliance with the act, may be probable; but this consequence is for the legislature, and not for the court, to consider. If we listen to these exceptions, others will soon arise, which will be said to come within the same principle; and the mischief and uncertainty which the supplement was intended to remedy will be again introduced. The rule which the legislature have prescribed has the merit of simplicity, and should not be departed from, except in a case of necessity; where, for instance, from legal principle, a *scire facias* cannot properly issue. The latitude of construction in which the courts have indulged, as to the original act of 1798, has been often regretted as a principal source of legal strife, uncertainty and difficulty.

It would be useless to decide the effect of *Meck's* discharge, for that cannot alter the disposition of the proceeds of the sale, however it may affect the vendee of the sheriff. The purchaser has paid for the interest *Meck* had in the land, whatever that may be, and the money having been brought into court, must be applied in the order of time of the liens existing upon the interest, whether real or supposed, according to their priority. It would be improper in this stage of the proceeding to inquire into the title of *Meck*. That is a question which must be decided in a suit between the trustees and the purchaser. Here it is of no consequence, whether the title is good or bad; it is sufficient that the land was sold as the property of *Meck*. *Jacob Meck* having died, it is estopped to deny, that he had such an interest as was subject to the lien of judgments in the order of time. The property was seized, condemned and sold as the property of *Henry Meck*; and as such, the proceeds must be distributed among the creditors, without regard to his title.

Judgment affirmed.

Bachman's Road.

A review of a road is a matter of right; but upon the report of the reviewers having been made, the court may, at their discretion, adopt it or the report of the viewers.

CERTIORARI to the quarter sessions of *Lancaster* county.

Case of the road, in Bart and Strasburg townships, Lancaster county, leading from *Bachman's* to *Trout's*.

In this case a petition was presented to the court at November sessions 1831, and a view granted, and return made by viewers to January session 1832: on the 16th of January, same year, "read and approved *nisi*." At the April sessions following, a petition was presented praying for a review, which was granted; and a report made to August session following, on the first day of the term, by the reviewers, declaring that there was no occasion for such road as that returned and reported by the viewers, on the order for a view, which was on that day "read and confirmed *nisi*." And the court afterwards, on the 27th of the same month, without any notice to any of the petitioners for the review or their counsel whose name was indorsed on the back of their petition, confirmed the view made to the court on the 16th of January, and set aside the confirmation of the report and return of the reviewers made to the August term.

Frazier, pro querente.
Hopkins, contra.

PER CURIAM.—A review is a matter of right; but although grantable at the instance of a party, it, as well as the view, is but to inform the conscience of the court, who may adopt the report of the viewers, or of the reviewers at discretion; as was held in the case of *Buckwalter's Road*, 3 *Serg. & Rawle* 236. As, then, the party at whose instance the review was granted, had no right to insist on having the report of the reviewers confirmed as a matter of course in the absence of a special objection to it, it was not error to adopt the one report without exceptions filed to the other.

Proceedings affirmed.

Pennock *against* Freeman.

A decree for specific performance of an agreement respecting the purchase and sale of land, is of grace and not of right. It rests in the discretion of the chancellor, who would, for any thing inequitable, withhold his assistance and leave the parties to their legal remedies on the agreement. An ejectment may be sustained to enforce an equity, but only as a substitute for a bill, and subject to all those considerations by which a claim to have the land itself may be defeated.

The fiduciary relation which exists between an administrator and heir, makes them so far privies in representation, that the act of the administrator will bind the heir, as that of his trustee.

An administrator necessarily succeeds to the decedent's right to rescind a contract for the purchase and sale of land by recovering back the purchase money, or he may leave the heir to affirm it by insisting on a conveyance.

Two persons entered into a parol agreement to purchase a tract of land, which was afterwards purchased, and a deed taken in the name of one of them: the other died; it was held that his administrator might maintain an action against the survivor to recover back the money advanced by his intestate, on the ground that the contract was vitiated in the origin by the fraud of the defendant, the surviving party. But in such action the contract must be wholly disaffirmed. The measure of damages shall not be estimated from any profit which was made upon a subsequent sale of the land.

Against a right of action, dependent on the existence of a secret fraud, the statute of limitation runs but from the period of discovery.

Under the forty-second rule of the circuit court, if a witness resides more than forty miles from the court, his deposition may be read, although he has not been served with a *subpœna*.

Testimony taken in another state upon a joint and several commission, may be read in evidence, although the commissioner named by the defendant did not attend at the execution of the commission.

APPEAL from the circuit court of *Lancaster* county.

This was an action on the case by *George Yentzer* administrator of *Jacob Pennock* deceased, for the use of *Franklin W. Pennock* his son and heir at law, against *Clarkson Freeman*, in which the declaration sets out specially the cause of action.

" *Clarkson Freeman*, late of the said county, doctor of medicine, was attached to answer *George Yentzer*, administrator *de bonis non* of *Jacob Pennock* late of the borough of Lancaster, deceased, for the use of *Franklin W. Pennock*, a minor son and only heir of the said *Jacob Pennock* deceased, who sues for his use by his guardian *John Yentzer*, in a plea of trespass on the case; whereupon the said *George Yentzer*, administrator as aforesaid, for the use aforesaid, complains, for that whereas, on or about the 10th day of November, in the year of our Lord 1810, at the county aforesaid, in a certain discourse which they, the said *Clarkson Freeman* and the said *Jacob Pennock*, then and there had and held, it was then and there agreed, by and between the said *Clarkson* and *Jacob*, as follows, to wit that they would join in the purchase (each paying one half) of a tract of land, situate in the state of Ohio, with a sawmill thereon erected, containing twenty-five acres of land, be the same more or less, with

the rights, members, and appurtenances thereto belonging, at and for the sum of 1951 dollars, the deed for the same to be taken in the name of *Clarkson Freeman* alone, to be held nevertheless by him, as to one moiety thereof, in trust for the said *Jacob Pennock* and his heirs in fee, which said promise and undertaking, being so as aforesaid made and concluded between the said *Clarkson* and *Jacob*, the said purchase was accordingly made, and a deed was executed by the vendor to *Clarkson Freeman* alone, (in trust nevertheless as to a moiety thereof as aforesaid) and a moiety or half part of the said purchase was paid by the said *Jacob Pennock* in the fulfilment of the promise on his part. And the said *Clarkson Freeman*, being so as aforesaid seised and possessed of the said land in trust as to one moiety to the use of the said *Jacob Pennock* and his heirs, then and there, in the same discourse, it was agreed and understood, that in case the said *Jacob Pennock* in his lifetime, or his heirs and legal representatives after his death, would release to the said *Clarkson* and his heirs, the equity of the said *Jacob* and his heirs in the said land, and all the right, title and interest of, in and to the same; that then and in that case, in consideration thereof, that he the said *Clarkson* would pay to the said *Jacob Pennock*, his heirs, executors, administrators or assigns, as much money as the one half of the said lands, with the appurtenances, is reasonably worth, when he should be thereunto afterwards requested. And the said *Jacob* in his lifetime, and the said *George Yentzer*, administrator aforesaid to the use aforesaid, since his death, aver, that they reasonably deserve to have for the said moiety of the said land, the sum of 5000 dollars, lawful money of the United States. And the said *George* further avers, that he and the said guardian, *John Yentzer*, before the issuing of the original writ in this cause, to wit, on the 7th day of August, in the year of our Lord 1821, at the county aforesaid, tendered to the said *Clarkson Freeman*, a release of all the equity, right, title, interest and claim of the heirs of the said *Jacob Pennock* deceased, of, in and to the said moiety of the said land, and then and there demanded payment of the said *Clarkson* for the same. Yet the said *Clarkson*, his promise and undertaking in no wise regarding, but contriving and fraudulently intending to deceive and defraud the said *Jacob Pennock* in his lifetime, and the said *George Yentzer*, administrator as aforesaid, to the use aforesaid, since his death, the aforesaid sum of money or any part thereof to the said *George Yentzer*, administrator as aforesaid, to the use aforesaid hath not paid, although to pay the same he, the said *Clarkson*, by the said *George*, was frequently requested; but to pay the same or any part thereof, he the said *Clarkson* hitherto hath refused, and still doth refuse, to the damage of the said *George*, to the use aforesaid, 5000 dollars, and therefore he brings suit.

"And whereas, also afterwards, to wit the day and year last aforesaid, the said *Clarkson Freeman*, at the county aforesaid, was indebted to the said *George Yentzer*, administrator as aforesaid, to the

use aforesaid, in the sum of other 5000 dollars, lawful money of the United States, for money which he the said *Clarkson Freeman* before that time had had and received, to the use of the said *George Yentzer*, administrator as aforesaid, to the use aforesaid; and being so indebted, he the said *Clarkson Freeman*, in consideration thereof, afterwards, to wit the said 7th day of August in the year of our Lord 1821, at the county aforesaid, undertook, and then and there faithfully promised the said *George Yentzer*, administrator aforesaid, to the use aforesaid, to pay him the said sum of money last mentioned when he should be afterwards thereto requested. Nevertheless, the said *Clarkson Freeman*, his promise as aforesaid not regarding, but contriving and fraudulently intending the said *George Yentzer*, administrator as aforesaid, to the use aforesaid, in this behalf craftily and subtilely to deceive and defraud, the aforesaid sum of money or any part thereof, to the said *George Yentzer*, to the use aforesaid, hath not paid, although to pay the same, the said *Clarkson Freeman* by the said *George*, the day and year last aforesaid, and at divers other times, at the county aforesaid, was requested; but to pay the same or any part thereof to the said *George*, to the use aforesaid, he the said *Clarkson* hitherto hath refused, and still doth refuse, to the damage of the said *George Yentzer*, administrator as aforesaid, to the use aforesaid, 5000 dollars, like lawful money, and therefore he brings suit, &c. And brings here into court the letters of administration, which testify the granting of the said administration to the said *George Yentzer*."

The pleas of the defendant were *non assumpsit*, and *non assumpsit infra sex annos*.

During the progress of the trial the plaintiff offered in evidence the deposition of a witness who did not live in the county, nor within forty miles of the court, and who had not been subpœnaed, which was objected to, and the objection was overruled, and exception taken by the defendant. He also offered in evidence the testimony of a witness taken in another state upon a commission, which was objected to, on the ground that the commissioner, named by him, did not attend at the execution of the commission. This objection was also overruled, and exception taken.

The following points put to the court, and the errors assigned, will sufficiently explain the facts of the case, to understand the principles decided.

The court is respectfully requested to charge the jury, and file their charge of record, on the following points, on the part of the defendant.

1. This suit is an action of *assumpsit* on an alleged promise by defendant to pay certain money, and the declaration alleges that "in the same discourse it was agreed and understood that in case the said *Jacob Pennock*, in his lifetime, or his heirs and legal representatives after his death, would release to the said *Clarkson* and his heirs, the equity of the said *Jacob* and his heirs in the said land;

and all the right, title and interest of, in and to the same, that then and in that case, in consideration thereof, that he, the said *Clarkson*, would pay, &c." There must be full proof of this agreement, and proof of only part is not a compliance with the allegation in the declaration, and they cannot recover in this action.

2. That to support this action, a *breach* of the contract by the defendant, during the lifetime of *Jacob Pennock*, must be shown, by proof, that a demand was made by the said *Jacob* in his lifetime, of the said *Clarkson*, to convey to him (the said *Jacob*) one moiety of the land alleged to have been purchased in partnership, and the refusal of the said *Clarkson Freeman* to convey the same.

3. That to support this action, proof must be made of a demand of half the value of the land by *Jacob Pennock*, in his lifetime, of the said *Clarkson*, and an offer by him (the said *Jacob*) to release his equity in the said lands, to the said defendant, and proof of a tender made of the said release, by the said *Jacob Pennock*, in his lifetime, to the said *Clarkson Freeman*, at the time of the demand of the money, or amount of said half value of the land.

4. That a demand by the guardian of the heir of *Jacob Pennock*, after the decease of the said *Jacob*, of the said *Clarkson Freeman*, to convey one moiety of the said land to the said heir, and a tender at the same time of a release of all the interest of the said heir, in the said land, signed by the said guardian, even if duly proved, cannot avail the plaintiff to recover damages in this cause; because such a release, drawn by a guardian, affecting the rights of his ward, in relation to the real estate of the said ward, is not good and valid in law; and therefore the said release, or a tender of the same, does not import a consideration, sufficient in law, to support a promise to pay money.

A verdict was rendered for the plaintiff for 1753 dollars and 33 cents. A motion was made by the defendant for a new trial, which was overruled; and he appealed to this court, and assigned the following reasons.

1. The above suit is brought to recover the amount due to *Franklin W. Pennock*, the son and heir of *Jacob Pennock* deceased, as set out in the declaration; and this suit cannot be maintained without proof of a release, executed and tendered by the said *Franklin W. Pennock*, of his moiety of the land. The release of the guardian of the said *Franklin W. Pennock*, is entirely insufficient; the said *Franklin W. Pennock* was of full age, for more than one year precedent to the trial.

2. The court erred in charging the jury, that, although the action could not be supported under the testimony in the cause, upon the first count in the declaration, the allegations in that count not being sustained by the evidence, yet that plaintiff was entitled to recover on the second count of the declaration, the amount of moneys advanced by *Jacob Pennock* in his lifetime, in 1810, to Dr *Freeman*, on account of the purchase, if the jury believe there was fraud and cir-

cumvention practised by defendant, in procuring *Pennock* to join in the purchase.

3. The court erred in receiving the deposition of *Daniel Moore*, esquire, and the papers accompanying it; and in admitting the commission, and deposition of *Mary Moran* taken under it.

4. The evidence of the sale of an undivided moiety of the tract of land, by Dr *C. Freeman* to *Peter Good*, for 1700 dollars, in 1814, and the deed for the same, were improperly admitted.

5. There was no evidence, on the trial of the cause, that *Jacob Pennock* ever paid his full portion of the purchase money. The only evidence that was given, was, that he paid 700 dollars; and there was evidence adduced by plaintiff to show, that a note in the Farmer's Bank for 600 dollars was discounted, for the mutual use of defendant and the said *Jacob Pennock*, and that defendant had to pay the whole of it, after *Pennock's* death. There was also evidence to show, that the whole tract has been entirely unproductive since 1814, and without any means by which it can be made productive; and the actual value of the whole tract, at this time, does not exceed 500 dollars.

6. The plea of *non assumpsit infra sex annos* precluded plaintiff from recovering the amount of moneys alleged to have been advanced in 1810, for which verdict was rendered.

7. The second count in the declaration is for money had and received, for the use of the administrator as such, who sues for the use of *Franklin W. Pennock;* and evidence of moneys received in the lifetime of *Jacob Pennock* from him, will not support this count.

8. The first count is in affirmance of the contract, and the second is in disaffirmance of the contract. Neither count, it is believed, can be supported. The first could not be, as the court declared; and as the verdict is general, it is erroneous and cannot be supported.

9. The verdict is contrary to the weight of the evidence and the justice of the case.

Rogers and *Champneys*, for appellants.
Jenkins and *Hopkins*, for appellee.

The opinion of the Court was delivered by

Gibson, C. J.—Though it was held when the cause was here before(*a*) that a suit might be maintained by the administrator, it

(*a*) Freeman *against* Pennock.

Opinion of the Supreme Court, delivered by Chief Justice Tilghman, May 28, 1821. *Gibson and Duncan, Justices, assented.* 3 *Penns. Rep.* 317, *in note.*

Tilghman, C. J.—This is an action on the case founded on an agreement alleged by the plaintiff to have been made between *Jacob Pennock* the intestate, and Doctor *Clarkson Freeman* the defendant below, respecting the purchase of a tract of land in

has nevertheless been argued, that a recovery by him would leave the defendant exposed to the ejectment of the heir, who would not, it is said, be estopped by a judgment to which he was neither

the state of Ohio. Each party was to pay a moiety of the purchase money, and the deed was to be taken in the name of *Freeman*, who was to hold one half in trust for *Pennock*, and convey it to him on demand. The purchase was made according to the agreement, the money paid equally by the parties, and the deed of conveyance executed to *Freeman* alone, who afterwards, in the lifetime of *Pennock*, refused to acknowledge the trust, or to convey a moiety to *Pennock*, though required by him to do so. *Pennock* left a widow, who died, pending this suit, and one child, an infant. Two bills of exception were taken to evidence admitted on the trial, and one general exception to the charge of the court.

The first exception was to the admission of *Jacob Miller* the plaintiff, as a witness. Previous to his being offered as a witness, it was proved that his administration account was settled, and he executed a release, which divested him of all interest in the estate of the intestate, so that his liability to costs was the only obstacle to his competency, and to remove this objection, 18 dollars and 12 cents, costs which had already accrued, were paid by *John Yentzer*, guardian of *Franklin W. Pennock*, the only child of the intestate, and a recognizance to the defendant in the sum of 1000 dollars was entered into by *James Hopkins* and *William Jenkins*, esquires, conditioned for their payment of "all costs incurred and to be incurred in the prosecution of this suit to the said Doctor *C. Freeman*, and which may accrue to him and all the officers of the court, witnesses produced by him, and all others *that may be* entitled to costs to the final determination of the cause, if the same should be determined in favour of the defendant, the same being legally taxed against the plaintiff in this cause." In the argument on this bill of exceptions, many points were made of which it is unnecessary to take notice, as there is one decisive objection to the plaintiff's competency, and that is, that inasmuch as this recognizance covered those costs only which should be incurred on the part of the defendant, the plaintiff remained answerable for his own costs, which, in case of a verdict in his favour, he would recover against the defendant. He was, therefore, immediately interested in the event of the suit, and ought not to have been admitted as a witness. It will be understood that the court gives no opinion whether the witness would have been competent, if the recognizance had been so drawn as to include all the costs, both of the plaintiff and defendant.

The second bill of exceptions was to the admission of parol evidence to prove the contents of a paper which was once in the possession of the defendant. The counsel for the defendant objected to the evidence, because no notice to produce it had been given to the defendant. The plaintiff's counsel admit the general rule, that notice is necessary, but contend that the paper in question was of no importance, and created no obligation; that it was the property of the defendant, and might be destroyed by him at his pleasure, and therefore, that it was unnecessary to give him notice to produce it. This paper, according to the account given of it by the witness who proved the contents, contained a statement in the handwriting of the defendant, of the money paid by the defendant, and by *Jacob Pennock*, respectively, towards the purchase of the land in which they were partners. It was not signed by the defendant, but was produced by him to the plaintiff.

Now, when it is considered, that the parties were at issue respecting the existence of a partnership, it will appear at once, that the paper was extremely important, because it proved the partnership by the written confession of the defendant. Whether it created any obligation, and whether it was the property of the defendant and might be destroyed by him without blame, are questions of no moment. The paper itself was better evidence than parol testimony of its contents, and therefore the defendant should have had an opportunity of producing it. It was plainly within the rule which required notice, and the parol evidence ought not to have been admitted.

The defendant's counsel proposed ten questions to the president of the court of common pleas, on which they requested his opinion to be delivered to the jury, and they now complain that several of these questions were not answered.

That it is error not to answer a legal question pertinent to the issue, has been often decided. The counsel for the plaintiff say, that the charge of the president contains an answer to all the questions proposed. I rather incline to the opinion that the questions are not all answered; but that point is unimportant, as this judgment must

a party nor privy; and hence it has been contended, that a release by the heir ought to have preceded the administrator's action. The point is made on the assumption of a position entirely unten-

be reversed for other reasons. But as it is often matter of dispute, whether the questions proposed to the court have been answered, I will suggest a mode of proceeding in such cases, which will prevent all possibility of dispute, and that is, to give the opinion on each question, in writing, immediately following the question. When the judge, instead of doing this, gives a general charge, in which he intends to answer all the questions proposed to him, it may sometimes happen that there may be an omission, or it may be doubtful whether there is an omission or not. These doubts have frequently occurred, and pains should be taken to prevent them, as they sometimes occasion the reversal of judgments which this court would wish to support.

But other errors have been assigned in the charge of the president. These may be reduced to two points. Is this action maintainable by the administrator of *Pennock*? And if it is, what should be the measure of damages?

1. The objection to the action is, that according to the plaintiff's own showing, there was a resulting trust to *Pennock* for a moiety of the land purchased in partnership, and therefore there is an equity in the heir, which the administrator has no right to convert into personal property, by this suit for damages. We have no evidence of the laws of the state of Ohio, but if they recognize the same principles of equity which prevail in other states, there would be an equity in the heir of *Pennock*, as to a moiety of the land purchased in partnership. Nevertheless, if the agreement was parol (as the evidence seems to indicate), and it was broken in the lifetime of *Pennock*, by the defendant's refusal to convey him a moiety of this land, a cause of action accrued, which, after his death, could be prosecuted by his administrator only. The heir cannot support an action for this breach of promise in the lifetime of his ancestor. Whether there may not be cases in which equity would permit the heir to make use of the name of the administrator to recover damages for his own benefit, I will not now inquire, because it is evident that any damages which may be recovered in this case would be for the use of the heir, he being the only child of his father, and entitled to the whole estate, both real and personal. There is a peculiar reason why the action should be maintained by the administrator in the present instance, and that is, that the courts of Pennsylvania have no jurisdiction over land lying in Ohio, and therefore, the only relief they can afford on this contract, is a personal action, which is very convenient, as both parties reside here. It may be more for the advantage of the heir of *Pennock*, to recover *damages* on this contract than to resort to a chancery suit in the state of Ohio, for the land itself; and if the contract is of such a nature as to give an action for damages, there can be no reason why the courts of Pennsylvania should obstruct it.

Where two citizens of the same state enter into an agreement respecting lands in another state, they naturally look to the laws of their own state for redress, in case of breach of contract. And in this reasonable expectation, the courts will not disappoint them. Of this, the case of *Penn* v. *Baltimore* affords innumerable examples, where the court of chancery of England compelled Lord *Baltimore* to a specific performance of articles of agreement for fixing the boundaries between the provinces of Maryland and Pennsylvania. If we had a court of chancery, no doubt *Freeman* might be compelled to execute a conveyance to the heir of *Pennock*. But not having such a court, I see no remedy but by an action on the case, on this parol contract, by the administrators of *Pennock*.

2. But if the action be maintainable, what should be the measure of damages? In considering this question, I will take for granted that the plaintiff is acting in concert with the guardian of the heir, which, from the record, I think myself warranted in doing. And under those circumstances, if the defendant did, upon request, refuse to convey a moiety of the land to *Pennock* in his lifetime, I see no objection to recovering one half the value of the land in damages. No second action will lie on this contract, and therefore, the defendant can never again be exposed to answer in damages. But damages to this amount, the defendant cannot say would be unjust, because the heir might afterwards go into the state of Ohio, and recover one half of the land. This I cannot suppose, because, being contrary to equity, it would not be permitted in a court of equity. Where one has a contract for land on which he may support an action at law, he may take his choice to sue at law, or seek a specific per-

able, that the decedent had a vested estate in the land. He certainly had an equity, which, if no obstacle to a specific execution of the trust were found in the circumstances, might have given him such an estate. But a decree of specific performance is of grace, and not of right. It rests in the discretion of the chancellor, who

formance in equity. But he cannot do both. He cannot recover damages at law from his trustee, for refusing to convey the legal estate, and then go into equity and recover the estate itself, on the ground of a resulting trust. Having made his election to sue at law, he must abide by it.

It appears that in this case the jury gave the value of a moiety of the land in damages, but the damages were given *generally*, and the declaration consists of five counts, two of which are said to be bad by the plaintiff in error. If so, the judgment would be erroneous, because this court cannot ascertain on what counts the jury meant to assess the damages. Where some of the counts are bad, and no evidence is given in support of them, the court before whom the cause is tried, may amend the verdict by entering it in favour of the defendant on the bad counts and for the plaintiff on the good counts only. But a court of error knows nothing of the evidence and can make no such amendment. Let us examine, then, the fourth and fifth counts in this declaration. The fourth count, in the first place, sets forth a verbal agreement between *Jacob Pennock* and the defendant, to join in the purchase of a tract of land containing twenty-five acres, with a sawmill, &c. for the sum of 1951 dollars, of which each party was to pay one half, and the deed was to be taken in the name of the defendant alone, to be held by him nevertheless, as to one moiety, in trust for the said *Pennock*, his heirs and assigns; and that the said purchase was accordingly made, a deed executed by the vendor to the defendant alone (in trust as aforesaid), and a moiety of the purchase money paid by the said *Pennock*. The declaration then avers that, in consideration of the promises, the defendant promised to pay to the said *Pennock*, his administrators and assigns, as much money as a moiety of the said land with the appurtenances was reasonably worth, &c. Now what consideration is there for this promise? I confess I can perceive none. The defendant had done every thing which the agreement required him to do; he had paid half the purchase money and taken a deed in his own name (in trust for *Pennock* as to a moiety): why then should he pay one half the value of the land? or what was he to receive in consideration of such payment? It does not appear that he was to receive any thing. If *Pennock* had agreed to release his equity in the land, it would have been sufficient, for then the defendant would have had title to the whole tract both at law and in equity. It is argued indeed by the plaintiff's counsel, that the equity of *Pennock* would have been virtually released by acceptance of half the value of the land. But this kind of argumentative release is not a sufficient consideration to support an assumption. The defendant might have paid his money, and then had to encounter a suit in chancery. If the agreement was, that *Pennock* should release his equity, the declaration should have so averred it, and a release should have been tendered when the money was demanded. I am of opinion, therefore, that this count is bad, because it sets forth a promise without consideration. The fifth count avers an agreement to purchase in partnership, a purchase made, a deed taken in the name of the defendant alone, the purchase money paid by each in moieties, &c. as stated in the fourth count, and then assigns a breach of promise as follows. "Yet the said defendant, his promise and agreement aforesaid in no wise regarding, since the conveyance of the said tract of land to him as aforesaid, gainsays his said promise and agreement, and refuses to hold and stand seised of an undivided moiety of the said tract of land to and for the use of the said *Jacob Pennock* in his lifetime and for the use of the legal representatives of the said *Jacob* since his decease, &c." The substance of the alleged injury is, that the defendant has told a falsehood by denying the trust: but this denial has not divested the right of *Pennock*. His equity remains just as strong after the denial as before, nor can any *words* of the defendant affect it. I cannot perceive, therefore, that this count sets forth any act or omission of the defendant by which the plaintiff has suffered damage.

Upon the whole then, my opinion is that the judgment should be reversed, and a *venire de novo* awarded; and inasmuch as it appears that the defendant has been compelled to pay the sum recovered, the plaintiff must make restitution.

would, for any thing inequitable, withhold his assistance, and leave the parties to their legal remedies on the agreement. Such is the course in respect of a purchase from a party intoxicated, though not by the procurement of the purchaser; yet such a purchase is unimpeachable at law. It is a want of attention to this, among other things, which leads us to suppose, as we sometimes erroneously do, that the equitable, is equivalent to the legal estate, in every respect but that of form. We sustain an ejectment on such an equity, it is true, but only as a substitute for a bill, and subject to all those considerations by which a claim to have the land itself may be defeated. So, for a fraud which avoids the contract, the purchaser may rescind the bargain, and elect to have his money again, even at law. The courts in Ohio, it is believed, have an equity side on which the proceeding is by bill; but the principles of equity, whatever be the form of their administration, would surely bar the heir from recovering the land there, after the administrator had recovered back the price of it here.

But that the heir is in no privity to the administrator, is also unfounded. He is entitled, at least, to a share of the residue of what may be recovered, after payment of debts; and standing in a fiduciary relation, he is so far a privy in representation, that the act of the administrator will bind him as that of his trustee. But the rights of creditors, for whom also the administrator is a trustee, are not to be postponed to the equities of the heir against those persons in whose hands the assets are found; and this personal right of action is clearly assets to be collected for the protection of domestic creditors (of the possibility of whose existence in the present case it is impossible to judge), instead of sending them to pursue their claims in foreign courts against real assets which may not be as accessible abroad as the personal assets are at home. In order to perform this duty of protection, the nature of which was pointed out, and its obligation enforced, in *Mothland* v. *Wireman*, 3 *Penns. Rep.* 187, and *Miller's Appeal*, 3 *Rawle* 319; the administrator necessarily succeeds to the decedent's right to rescind the contract, by recovering back the purchase money, or leave the heir to affirm it, by insisting on a conveyance.

But though it had been held, that a personal action might lie, the nature of the case on which it might be maintained, had not been intimated. It would be founded only on a breach of the contract, or a rescission of it. But when the cause came to be tried, the special counts were found to be unsupported by the proof; and it remained to be determined, whether a recovery might not be had on the general count, by treating the contract as at an end, and the intestate's share of the purchase money as having been received by the defendant to the intestate's use. With this intent the cause was put to the jury on the point of actual fraud, of which there was full and ample proof, which, by vitiating the contract in its origin, gave a clear title to a return of the money paid under it. The plaintiff had

shown a sale by the defendant, of a moiety of the land at an advanced price; which, he contended, was the measure of the damages. But the jury were directed, that the price of the land sold by the defendants, could be recovered only on the basis of the contract, of which the recovery would be an affirmance; besides, that the right of the plaintiff's intestate was not specifically attached to the moiety sold, and that enough still remained in the defendant, as a trustee of the legal title, to satisfy the trust; and that he was, therefore, entitled but to the money paid by his intestate, with interest. From this it is apparent, that though evidence of the re-sale, and the price received, was irrelevant, it was not sufficient to influence the verdict, which was right upon the merits.

There are minor points which deserve but a cursory notice.

Against a right of action dependent on the existence of a secret fraud, the statute of limitations runs but from the period of discovery: and though more than time enough to complete the bar had elapsed between the receipt of the money and the institution of the suit, it did not appear that a sufficient time had intervened between the latter, and the discovery of the fraud which annulled the contract and entitled the intestate or his representative to repetition of the purchase money. On this ground the defence on the statute of limitations was put to the jury, and it seems to us properly disposed of in the verdict. To the objection that the proof did not support the general count, in which the money is laid to have been received to the use of the administrator, and not of the intestate; it is a sufficient answer, that the point was not made at the trial, or in time to give the plaintiff an opportunity to have the discrepance removed by an amendment. As to the objection that the verdict was taken generally, and not on the count which was the actual basis of the recovery; it is enough to say, that whatever effect that might have on a motion in arrest of judgment for faultiness of a particular count, it is certainly not a valid reason for a new trial.

The exceptions to evidence are not sustained. By the provisions of the forty-second rule of the court, the deposition of *Daniel Moore* was properly received, even without proof that he had been served with a *subpœna*; as it was conceded that he resided more than forty miles from the place of trial; and his testimony was not secondary to that of the other witness called to prove the same fact. In like manner the deposition of *Mary Moran*, taken on a joint and several commission to the state of Delaware, was properly received, though the commissioner nominated by the defendant did not attend at the execution of it. The known character and standing of the absent commissioner forbid a suspicion that he was purposely out of the way; but it must be apparent that if the absence of a commissioner were sufficient to stop the proceeding, a joinder in the commission might always be used to defeat the object of it. But there was no deficiency of authority. The commission being both joint and several, and therefore providing for the very contingency that actually hap-

pened, was well executed *ex parte;* and as all the interrogatories appear to have been answered, there is no cause on this or any other ground to disturb the verdict.

Judgment affirmed.

Brown *against* Webb.

A *scire facias* to revive a judgment after the death of the defendant, must be sued against his executors or administrators: they must be made parties to it. If sued only against the heirs in possession of the inheritance, it is erroneous.

WRIT of error to the court of common pleas of *Lancaster* county.

To January term 1824, *Jeremiah Brown* obtained a judgment against *Jonathan Webb* for 512 dollars. Subsequently *Jonathan Webb* died intestate, seised of real estate, of which *William Webb*, *Peter W. Webb* and *Rachel Webb*, three of several children, were in possession, when this *scire facias* issued against them to show cause why they should not become parties to the said judgment, and why the plaintiff should not have execution of the lands of the decedent in their possession. The defendants plead payment, with leave, &c. Replication, *non solvit*, issue.

The defendants, after the jury was sworn, offered to plead specially to the jurisdiction of the court and to the sufficiency of the parties; but both were rejected by the court below because they were out of time. The question turned alone upon whether the plaintiffs could recover at all upon a *scire facias* against the heirs, without joining the personal representatives. By the direction of the court below the plaintiff recovered, and the defendants sued out this writ of error.

Champneys, for plaintiff in error, cited, *Act of Assembly of* 1798, respecting the revival of judgments; 2 *Saund.* 210, *in note;* 3 *Bac. Ab.* 114, 115; 1 *Chit. Pl.* 435, 452; 7 *Serg. & Rawle* 328.

Montgomery, for defendant in error, cited, *M'Lanahan* v. *M'Lanahan*, 1 *Penns. Rep.* 113; 16 *Serg. & Rawle* 432; 2 *Saund.* 7; 7 *Serg. & Rawle* 328.

The opinion of the Court was delivered by

KENNEDY, J.—Several errors have been assigned in this case, but as the court is of opinion that the proceeding and judgment had against the plaintiffs in error in the court below cannot be supported by the laws and practice of this state, it becomes unnecessary to notice them.

[Brown v. Webb.]

Although the ground upon which this court considers the proceedings and judgment in this cause erroneous, has not been formally assigned for error according to a rule which we have adopted; yet this rule, as chancellor *Kent* observes in *Palmer et al.* v. *Loriland et al.*, 16 *Johns.* 353, 354, "was only intended to be applied to objections, that the party may be deemed by his silence to have waived, and which when waived, still leave the merits of the case to rest with the judgment. But if the foundation of the action has manifestly failed, we cannot, without shocking the common sense of justice, allow a recovery to stand." Or if, for want of a proper party to the proceeding, great injustice may be done to the interests and rights of others, it would be equally shocking to permit the proceeding and judgment to be carried into execution.

By the act of assembly passed in 1705, lands in this state were made goods and chattels for the payment of debts. They were made liable to be taken in execution and sold as such, unless the rents, issues and profits thereof were found sufficient beyond reprizes to pay the amount of the execution within seven years.

Until 1806 they might have been seized in execution under a *fieri facias*, although the defendant had personal property of any value above the amount of the execution; when the legislature restrained the seizure of lands as long as the defendants produced personal property sufficient to satisfy the executions. So completely are lands considered goods and chattels for the payment of debts, that they may be taken in execution under a *fieri facias*, which directs the sheriff to levy on the *goods and chattels*, &c., without mentioning lands specifically. See *Andrew* v. *Fleming*, 2 *Dall.* 93. Upon the same principle of lands being assets, the same as goods and chattels, for the payment of debts, it has been held, that where the land of a deceased debtor has been sold under an execution on a judgment against the administrator, the money arising from the sale must be distributed according to the order prescribed for the payment of the debts of decedents by the act of 1794, in the case of personal assets. See *Agricultural Bank* v. *Stambaugh*, 13 *Serg. & Rawle* 299. And that under the fourteenth section of that act, the assets arising from the sale of the real as well as personal estate of decedents, must be averaged among the creditors, when both collectively are insufficient to pay the whole amount of the debts. *Wootering* v. *Stewart et al.*, 2 *Yeates* 483.

As long as there are personal assets sufficient to pay the debts of the deceased debtor, it would be wrong, and, it appears to me, would be contrary to the spirit of the act of 1806, as well as to the settled principles of practice in this state, to resort to, or to take the lands of the deceased in execution for the payment of his debts. And upon this principle it is, and not unless the personal assets shall be shown by the administrators or executors to be insufficient for the payment of the debts, that the orphan's court of the county in which the real estate lies is authorized to decree a sale of it, or as much of it as may be

sufficient to supply the deficiency in the personal estate to meet the payment of the debts.

The form of the judgments rendered against administrators and executors is, "*de bonis*," &c., omitting the words "*et terris*," which, I think, are rarely if ever inserted; upon which writs of *fieri facias* are issued, and the land as well as the personal property of the decedents are taken in execution and sold. It has been the practice in many counties of the state; and I would have supposed the universal practice throughout, were it not for what is said in the case of *Wilson* v. *Hunt's Executors*, 1 *Peters's C. C. Rep.* 442, *in note*, that on the plea of no assets, where the plaintiff does not choose to controvert the plea, or in case he does, and there be a verdict for the defendant, for the plaintiff to pray judgment *de bonis quando acciderint*, &c.; and upon this judgment, when entered, if there be lands of the deceased, to take out a writ of *fieri facias*, and to levy upon them without further process of any kind. The plea of no assets is considered as being confined, and applying only to personal assets, and not as militating against the idea of there being real assets. The words "*quando acciderint*" are to be considered as having a reference to personal assets merely, and as excluding all idea of there being any in the hands of the defendant at the time of entering the judgment. With respect to real assets or lands, they are always in being until disposed of, and the words "*quando acciderint*," therefore, are inapplicable to them.

Immediately upon the death of a debtor in Pennsylvania, his debts of all grades become indiscriminately a lien upon all his lands lying within the state of which he died seised in fee, and continue to be so for a period of seven years, excepting such as our statute of general limitation may happen to run against, and to bar the recovery of them, without suit or other act being done upon the part of the creditors, for the purpose of continuing their lien; and if within that time, when the debts have become payable, suits be commenced, or if not payable within that space, a statement of them be filed in the prothonotary's office of the county where administration has been taken upon the estate of the deceased, the lien becomes illimitable. The lands of the debtor being thus made completely chattels for the payment of his debts, although they do not pass into the hands of the executors or administrators as personal assets do, yet they are liable to be seized and taken in execution, and sold upon a judgment had against the executors or administrators, in like manner as personal goods which have come into their hands and possession; provided the rents, issues and profits beyond reprizes of the land seized should be found insufficient to pay the amount of the execution within the space of seven years. See *Wilson* v. *Watson*, 1 *Peters's C. C. Rep.* 273. The lands and personal goods of the deceased may both be seized and sold under the same execution, if necessary to satisfy it. So that upon the same judgment and execution against a debtor, if living, or against his personal representatives, if dead, the land or personal goods, or both, may be taken in execution and sold.

[Brown v. Webb.]

In England, whenever the ancestor by his obligation binds himself and his heirs by name for the payment of money, and he dies, leaving the debt unpaid, and seised of lands in fee simple equal in value to the amount of the debt, which descend to his heir, an action of debt in the *debet* and *detinet* may be maintained against the heir, against whom a judgment will be rendered personally for the amount of the debt. 2 *Saund.* 7, 8, *note* (4); 2 *Bl. Comm.* 156.

In Pennsylvania such an action is unknown, and I take it, cannot be sustained. It would militate against the policy and provisions of our law, which has committed the administration of the deceased's estate to his personal representatives for the special purpose of paying his debts; and as the means of doing so, has made both the real and personal estate of the deceased liable to be taken in execution and sold; and in case of its insufficiency to pay all the debts, has required that the moneys arising from the sales of both the real and personal estate shall be apportioned among the creditors of equal grade in like manner as if it were all personal.

Under the act of 1705, all possible titles, contingent or otherwise, in lands where there is a real interest, may be taken in execution. See *Humphreys* v. *Humphreys*, 1 *Yeates* 427; *Hurst* v. *Lithgow*, 1 *Yeates* 24; 2 *Dall.* 223; *Burd* v. *Dansdale*, 2 *Binn.* 80, 91. It then follows as a necessary consequence, from the principle of making lands and real estate liable to be taken in execution and sold for the payment of debts as personal goods and chattels, and to be appropriated and apportioned as personal assets in the payment of the debts of deceased debtors, that the suits of creditors for the recovery of their debts must, and ought to be commenced and prosecuted against the executors or administrators of the deceased, and not against his heirs. It belongs exclusively to the executors or administrators to take possession of the personal estate, and to collect all moneys which were owing and payable, or may become so in any wise to the estate of the deceased, and to apply the whole in the first place to the payment of the debts. Thus they necessarily become acquainted with the debts owing to the estate, and likewise with their amount. And as the personal assets are to be first applied by them and exhausted, if necessary, in the discharge of the debts, before the real estate is to be resorted to, they are the only persons who can know whether, and what of the debts of the deceased remain unpaid, and whether the real estate is liable and ought to be resorted to or not, and if so to what extent. Hence, of all that have any concern with the estate, the executors and administrators become the best qualified to answer to any suit that may be brought to recover a claim made against the estate of the deceased. Whether it has been already paid in part or in whole out of the personal assets must be known to them, but may not be so to the heirs of the deceased. Or if it should happen to be a claim that was paid by the deceased in his lifetime, the evidence of such payment is more likely to be in the possession or knowledge of the executors or administrators, than of any other person or

persons. From all which it seems to follow, that they must be better able to defend and protect the real estate of the deceased in the hands or possession of the heirs or devisees or terre tenants from unjust claims, than the heirs, devisees or terre tenants themselves can possibly be. And in addition to this, when we come to consider, that the estate, both real and personal, may be insufficient to satisfy all the debts, in which case we have seen, that both estates must be applied to the payment of debts, and apportioned among them the same as if the whole were personal assets, according to the order and the grade prescribed by the act of the 19th of April 1794; the agency and knowledge of the executors or administrators become indispensably necessary, in order that this may be fairly accomplished, and done without prejudice to the creditors as between themselves, who must be preferred and paid in the following order. 1. Physic and funeral expenses. 2. Rents, not exceeding one year. 3. Judgments. 4. Recognizances. 5. Bonds and specialties. And next, all other debts, excepting those owing to the state, which are to be last paid. Hence arises, not merely the propriety, but almost the absolute necessity of making the executors or administrators a party to every legal proceeding which shall be commenced for the purpose of collecting a debt due from the decedent at the time of his death, whether it be the real or the personal estate that must be resorted to for the purpose of attaining this end.

It is said that it is more important to make the heirs or the devisees parties where the real estate is intended to be proceeded against, because they are the persons most materially interested. Admitting this to be so, yet we must recollect that the rights and the interests of the other creditors besides the one suing, who may be presumed to be known to the executors or administrators and not to the heirs, are to be protected and made secure, so far as the estate may be adequate for that purpose; but without a knowledge of them and their claims this cannot be done. Besides, there is no reason why the executors or administrators should not be trusted with the defence and protection of the real, as well as the personal estate, against unjust claims in the form of debts. They would be held responsible to the party injured by their unfaithful and fraudulent conduct in the one case as well as the other; or if the heirs, devisees or terre tenants shall discover in due time that their interests have been neglected, or are not likely to be attended to by the executors or administrators in a suit against them, or that their interests have been betrayed by collusion with the plaintiff in the suit, they will be permitted, in the names of the executors or administrators, to defend for themselves. *See Fritz* v. *Evans*, 13 *Serg. & Rawle* 9. And this, no doubt, would be permitted at any stage of the proceeding before a sale of the property, when the application is made to the court for that purpose as soon as the party shall have notice of such fraudulent conduct or neglect.

In England, although lands may be taken in execution, yet in no

case can they be sold for the payment of debts. The creditor is compelled to be content with waiting until he can receive payment of his debt out of the rents, issues and profits of the land. The ownership of the fee simple undergoes no change. No purchaser of it for a valuable consideration intervenes to claim the protection of the law; but the land still remains to be taken as the property of the debtor to satisfy his creditors out of the annual rents, issues and profits thereof, according to their seniority of lien, whenever they shall choose to proceed against it by execution. And if a junior judgment creditor should issue his execution first, under which he has one half of all the defendant's lands extended, that cannot prevent a senior judgment creditor from issuing afterwards an execution upon his judgment and taking the same land in execution; nor can the junior judgment creditor, who issued his execution first, complain of being thereby injured; for he is only forced to give up the possession of the land to a certain extent after having enjoyed the profits of it for a time, which the senior judgment creditor might, if he had pleased, at first have prevented him taking. He is, in truth, through the neglect or indulgence of him who had a prior right, benefited rather than injured. It is then out of the annual value or profits of the land beyond reprizes that the judgment creditors are to be paid, if they should choose to proceed against it; and so far as a junior judgment creditor has been permitted to enjoy the annual value of the land under his execution, it is a satisfaction of his debt *pro tanto;* but the moment that he is superseded by the execution of an older judgment, the increasing satisfaction of his judgment is suspended, and it continues to be a security for whatever may remain unsatisfied of it. Thus it appears, that by proceeding against the heir in England, to enforce the payment of a judgment obtained against the ancestor in his lifetime, as it is out of the annual profits of the land that the creditor is to be satisfied, no injury can arise therefrom to other creditors who may even have preferable claims, because it does in nowise preclude them from proceeding afterwards against the same land. It may not be improper to mention, that although they have in England a statute somewhat similar to ours, prescribing the order of preference in which the debts of a deceased person shall be paid by his executors or administrators, yet it does not extend to or embrace his real estate as ours does. And again, that the old principle of the common law, upon which an action was first sustained, and became necessary against the heir to recover the debt of the ancestor, never existed in this state; which was this, that the executor or administrator was entitled to the whole of the personal estate, to the utter exclusion of the creditors of the testator, and no alternative was left for them but to proceed against the real estate. 3 *Rep.* 12, *a;* 2 *Saund.* 7, 8, *note* (4). If it be then, that the cause of proceeding in England is well adapted to carry into effect the ultimate design of their municipal regulations on this subject, it would seem to be almost a necessary inference, that it would be ill suited

to attain the end of our law on the same subject, which has been shown to be so entirely different.

Since lands or real estate have been made goods and chattels for the payment of debts in this state, it has become a great *desideratum*, as often as a judicial sale shall be made of the legal estate in them for that purpose, to have the proceedings so regulated, if possible, as that the sale shall pass a title to the purchaser free from all liens, and claims for, and on account of the debts of the owner, as also of those from and through whom he derives his title, so that they may be held by the purchaser in the same manner, in severalty or otherwise, as they were held by the debtor himself, and discharged of all liens on account of such debts; to the end that persons disposed to buy may know what they are buying, and may be induced to give fair and full prices for them, and thus advance the interest, as well of the creditors as of the terre tenants, or the heirs and devisees of the decedent.

But if such a proceeding as has been had in the present case is to prevail, such object can not be attained. It is a proceeding by *scire facias*, as appears from the evidence given on the trial of the cause, against three of eight children and heirs of *Jonathan Webb* the deceased debtor, and defendant in the original judgment. The plaintiffs in error, who were the defendants below, seem to have only an undivided interest with the other five children in the lands of which *Jonathan Webb* the debtor died seised in fee; and it will scarcely be pretended, that under the judgment rendered against the plaintiffs in error below, that more than their undivided interest in the lands could be taken in execution and sold. Now it is obvious that such an undivided interest would not be a very desirable purchase, and therefore would be likely to produce a great and unnecessary injury to some of the parties concerned: besides, it is possible that a doubt might exist in the minds of some who might be disposed to buy, whether, as it was perhaps only the interest of three of the heirs of *Jonathan Webb* that was selling, the whole estate, including this interest, might not be liable to be sold afterwards as the estate of the deceased, upon a judgment to be obtained by another creditor against the administrators. It is manifest that such a course of proceeding, if not arrested, is calculated to do great injustice to the other creditors of the deceased, if there happen to be any, as well as his heirs.

As having a bearing upon this case, I may refer to what is now to be considered the settled doctrine by this court, in regard to the persons against whom the action must be brought, in order to recover a legacy charged upon land, for which no claim whatever can be made upon the personal estate of the testator, as in the case of debts. Yet the executors must be made defendants to the suit, as well as the devisee of the land. But this is done for the purpose of protecting the creditors of the testator, with whose claims, if there should be any, the executors are presumed to be acquainted; and in case it should become necessary, after a judgment obtained for the amount

of the legacy, to proceed by execution to sell the land, that it may be sold for a full price, discharged from the lien of the debts of the testator, as well as of the devisee himself, and out of the money arising from the sale, all be paid according to the order of preference prescribed by law, and seniority of lien. See *M'Lanahan* v. *M'Lanahan*, 1 *Penns. Rep.* 112, 113; *Brown* v. *Furor*, 4 *Serg. & Rawle* 217, 218; *Gause* v. *Wylie*, 4 *Serg. & Rawle* 509; *Moore* v. *Rees*, 13 *Serg. & Rawle* 436; *Otty and Wife* v. *Ferguson*, 1 *Rawle* 294.

Now, after having decided that the executors, who have nothing to do with the payment of a legacy charged upon land, must be made defendants in a suit brought to recover it; would it not seem somewhat incongruous, if not inconsistent, to dispense with their being made defendants in a suit to recover a debt against the estate of the deceased, when it belongs to them particularly to ascertain all the debts that exist against the estate, and to have them all paid, or at least so far as the estate may be adequate to it?

But it appears to me, that even admitting that terre tenants, after the death of the defendant in the judgment, may be proceeded against here as in England, that the proceedings and judgment in this case against the plaintiffs in error are erroneous; for it does not appear that *Jonathan Webb* died without leaving heirs, yet the writ of *scire facias* contains no direction whatever to warn his heirs, but to warn the plaintiffs in error as being in possession of his real estate as terre tenants merely; neither does it appear that any previous writ of *scire facias* was issued to warn the heirs; so that there may be heirs of *Jonathan Webb* in full life, having lands which were of the deceased at the time of the judgment, and within the jurisdiction of the court below, and yet no attempt made to warn them.

It is laid down in 2 *Mallory's Ent.* 389, *pl.* 28 (and 18 *Ed.* 2, *Execution* 242; 1 *Roll. Abr.* 900, *Letter R*, *pl.* 2, are cited for it), that "when the conusor is dead and a *scire facias* is sued out against the heir and he is returned dead, a *scire facias* lies against the terre tenant;" from which it might be fairly inferred that it does not lie before. But it it is not left to inference, for in the next *pl.* (29) he further expressly declares, that "until it is returned that the conusor *is dead without any heir*, or that the heir is summoned, the terre tenant shall not be summoned, because the heir may have an acquittance," for which he quotes the same authorities, adding *pl.* 3 instead of *pl.* 2, in 1 *Roll. Abr.* 900, *Letter R.*

Sergeant *Williams*, in his note (4), 2 *Saund.* 7, says, "it is the usual way to join the heir and tenants of the land, or, as they are generally called, terre tenants, in the writ of *scire facias*," and refers to *F. N. B.* 597, *note* (*a*), *Cro. Eliz.* 896; *Heydon's Case*, *Cro. Car.* 295; *Eyres* v. *Taunton*, 2 *Salk.* 598; *Panton* v. *Hall*, *Lill. Ent.* 384, which seem to support his position fully, and at the same time sustain and confirm the proposition that the terre tenants can not be called on to answer without the heir, if there be any, and if there be

none, that that ought to appear by the return of the sheriff to the writ.

I am also inclined to think that the writ of *scire facias* is erroneously defective, in omitting to notice the plaintiffs in error as tenants of lands which were of the said *Jonathan Webb on the day of the date of the judgment;* because as a judgment, according to the laws of this state, it could be a lien upon no other lands; and I take it, that in England it is only the terre tenants of the lands of the deceased, upon which the judgment as such became a lien, who are to be warned; for certainly no other can be made liable to execution under it in the hands of terre tenants, who have become such by purchase for a valuable consideration. There the judgment binds lands subsequently acquired, and hence the words "or at any time after" are superadded in the writ to the words "tenants of the lands and tenements which were of the said A. B. at the time or on the day of rendering the judgment aforesaid;" but here the judgment binds those lands only of which the defendant was seised at the time of entering it. *Rundle* v. *Ettwein*, 2 *Yeates* 23. In England the sheriff is therefore commanded by the writ to make known to the heir of the said A B, and also to the tenants of the lands and tenements which were of the said A B *at the time of rendering the judgment aforesaid, or at any time after*, that they be, &c. See 2 *Lill. Ent.* 384, 385. The writ, however, in this case recites, *inter alia*, that the real estate of the said *Jonathan Webb* had been, and still was, in the hands and possession of the plaintiffs in error, without saying when or at what time he was seised of it—whether before, at the date of the judgment, or afterwards; and then directs the sheriff to give notice to the plaintiffs in error by name, calling them also "terre tenants of the lands of the said *Jonathan Webb*, &c. to show, &c. why they should not be made parties to the said judgment, and why the said *Jeremiah Brown* should not have execution against the forge and lands of the said *Jonathan Webb* deceased, in their possession, for the debt and damages, &c." Now it is manifest, that notwithstanding all that is alleged or suggested in this writ, that although *Jonathan Webb* may have been seised in fee of the forge and all the lands mentioned therein, it may have been before the judgment was obtained, and not at the time of entering it, or any subsequent period whatever. Where is there then any good cause shown for calling upon the defendants to answer? The plaintiffs in error, by putting in the plea of payment below, do not appear by that to me to have supplied any defect, or in any degree to have changed the allegations or suggestions, as to this particular, in the writ, for the benefit of the defendant in error. Neither can I perceive that the verdict of the jury has cured the defects here alluded to, unless the last plea put in by the plaintiffs in error during the trial of the cause below, which is quite as loose and wide of the mark as the writ itself, and seems to have been drawn up with a view to negative those allegations contained in the writ, which I have shown to be quite too

uncertain to form a material issue, be considered as substantially putting in issue the fact, whether or not the plaintiffs in error were the tenants of any lands of which *Jonathan Webb* was seised, and which were bound by the judgment. If looked upon in this light, then, the verdict is defective and insufficient, because the jury, if they found that the plaintiffs in error were the tenants of any such lands, ought by their verdict to have returned what lands, describing them with reasonable certainty.

All then that is set forth in the writ of *scire facias* as to the plaintiffs in error being tenants of the lands, is perfectly consistent with their having become such by purchase fairly, for a valuable consideration, from *Jonathan Webb*, before the judgment was obtained by *Brown*, in which case it can not be pretended that they could be taken in execution under the judgment. See 2 *Saund.* 8, *note* (5), and the authorities there cited by serjeant *Williams*.

This court is of opinion that the heir, devisee or tenant can not be called on to show cause why execution should not be had of the lands which they hold, and which were of a decedent at the time of rendering the judgment against him, without first warning, or at least joining the executors or administrators in the writ of *scire facias* and warning them at the same time for that purpose.

The judgment of the court below is reversed.

Turner *against* Hauser.

A widow of an intestate, whose annual interest is charged on the land taken, is entitled to come in under the fourteenth section of the act of 1794, as against the personal estate of the *terre tenant* for one year's interest as rent, and this, by construction of the sixth section of the act of 1807, which provides, that her interest "may be recovered by action of debt or by distress, *as rents* are usually recovered in this commonwealth."

By distraining the goods of the *terre tenant* after his death, where more than one year's interest is in arrear, the widow can not obtain more than one year's interest, and thus defeat the order of payment prescribed by the act of 1794.

ERROR to the court of common pleas of *Schuylkill* county.

This was a case stated in the nature of a special verdict, in which *David Hauser*, administrator of *Jacob Hauser* deceased, was plaintiff below, and *David Turner* defendant. The following are the facts of the case.

On the 30th day of July 1814, in the orphan's court of the said county of Schuylkill, a tract of land, situate in Westpenn township, late the estate of *Jacob Hauser* the elder (father of the plaintiff's intestate), was by the said court adjudged to *Jacob Hauser*, the plaintiff's intestate, at the appraised value thereof—the widow, his mother's

third, to wit 1000 dollars, being charged thereon, the interest to be paid annually, &c. agreeably to the intestate laws of this commonwealth.

December 18th, 1827. *Jacob Hauser*, the plaintiff's intestate, died, leaving also a widow and sundry children, including the plaintiff in this suit, residing on the premises in question.

January 5th, 1828. *Eva Hauser*, the widow of *Jacob Hauser* the elder, to whom several years interest was due, issued her warrant to the defendant above named, in the following words, to wit:

Whereas *Jacob Hauser*, of the township of Westpenn, county aforesaid, died intestate some time since, leaving a widow named *Eva*, and issue several children, to whom his real estate descended agreeably to the laws of this commonwealth, which real estate was valued under the direction of the orphan's court of said county, and the widow aforesaid became entitled to the interest of the one-third of the real estate, in lieu of dower at common law. And whereas about two hundred acres were adjudged to *Jacob Hauser*, one of the sons of said deceased, amounting to the said widow the sum of 60 dollars interest annually. And whereas the annual sum of 60 dollars is due and unpaid for four years and upwards, amounting to 240 dollars. This is therefore to authorize and require you to distrain the goods and chattels lying and being upon the land so valued as aforesaid, late the real estate of the said *Jacob Hauser* deceased, and to proceed to sell the same according to law, for the best price that can be gotten, returning the overplus, if any, to the person or persons entitled thereto, after payment of the arrearages of said dower, and legal costs and charges of such distress. Witness the hand and seal of the said *Eva Hauser*, at Westpenn township aforesaid, the 5th day of January, A. D. 1828.

It is admitted, that four years' interest was due and unpaid, to wit 240 dollars, at the issuing of the warrant aforesaid.

January 7th, 1828. *David Turner* the defendant above named, in pursuance of said warrant, made distress on the premises aforesaid, charged with the widow's thirds aforesaid, and took of the goods and chattels of the plaintiff's intestate being thereon, amounting to 248 dollars. It is also admitted, that regular notice of such distress was served on the widow and representatives or heirs of said *Jacob Hauser*, the plaintiff's intestate, who remained on said premises, and that the said distress was regularly appraised and sold.

February 4th, 1828. *David Hauser*, the plaintiff, took out letters of administration to the estate of his said father, *Jacob Hauser* the younger.

There exists on the records of the court of common pleas of Schuylkill county a judgment against the said *Jacob Hauser*, the plaintiff's intestate, of 530 dollars, at the suit of *Mary Wehr* and *Jacob Wannemacher*, administrators, &c. of *Tobias Wehr* deceased. Entered up to July term 1820. No. 152.

And it is admitted that the estate of the said *Jacob Hauser*, the

plaintiff's intestate, is insolvent, and not sufficient to pay the whole of the judgments.

If the court shall be of opinion, upon the above statement of facts, that *Eva Hauser* had a right to make the distress aforesaid, and had a right to take the proceeds thereof to the satisfaction of her interest; then judgment in favour of the defendant.

If the court shall be of opinion that *Eva Hauser* had no right to make the distress aforesaid, and appropriate the proceeds thereof to the payment of her interest; then judgment in favour of the plaintiff for 248 dollars.

But if the court shall be of opinion that *Eva Hauser* had no right to make the distress, but that she would be entitled to a priority of payment for one year's interest out of any assets in the hands of the plaintiff as administrator; then judgment in favour of the plaintiff for the sum of 188 dollars only.

The error assigned was, that the court ought to have given judgment for the defendant.

Bannon, for the plaintiff in error, argued, that the interest of the widow is a charge upon the land, for which the tenant is liable only in respect of the land. It is recoverable as rents are recoverable, by distress, &c.; it is not a rent; but all the personal property of the tenant found upon the land may be distrained, and the death of the tenant, or his insolvency, can make no difference. If this be not the correct doctrine, she would be without remedy in such a case as that before the court; as the act of 1794, although it provides for the payment of rents, does not include the case of a widow's interest.

Loeser, for the defendant in error, contended, that the principle involved in the case was decided. To prevent a scramble among creditors, the fourteenth section of the act of 1794 directs the order in which debts of a decedent shall be paid, and the assets distributed. A plaintiff who sues out execution against the estate of an intestate gains no preference by so doing. A landlord, under the act of 1794, comes in for one year's rent. A widow, by the acts of 1794 and 1807, *Purdon* 407, 412, as to her interest, is placed on the same footing; she, therefore, could no more obtain a preference by distraining in regard to these assets, which are disposed of by the act of assembly, than the execution creditor.

The opinion of the Court was delivered by

Rogers, J.—When partition is made of an intestate's real estate, and there is a widow living, and entitled to a part of the real estate during life, an estimate is made of the value of her part, which is apportioned in the manner prescribed by the act of the 7th of April 1807. On confirmation, the ascertained value is directed to remain a charge on the shares of the children or representatives, the interest of which the court orders to be annually and regularly paid to the

widow. When there is a failure of payment, the interest of the widow may be recovered by action of debt, or by distress, as rents are usually recoverable in this commonwealth. In pursuance of the act referred to, the orphan's court of Schuylkill county adjudged a certain tract of land to the plaintiff's intestate, and charged the same with the payment of 1000 dollars, the interest to be paid to the widow during life. *Jacob Hauser* the younger died intestate and insolvent. The act makes the interest of the widow a charge on the real estate: and if that were the fund to be affected, a different case might be presented; but here the widow demands satisfaction out of the personal assets. The legislature say, that the annual charge may be recovered by action of debt, or by distress, as rents are usually recoverable in this commonwealth. Had the widow brought an action of debt against the administrators, it would scarcely be contended that she would be entitled to more than her share of the assets, and in the order prescribed in the act for the payment of debts. And it is equally plain, that had no distress been made, the administrators would not have been justified in paying more than one year's interest, as in case of rent. What meaning then must we attach to the words—to be recovered by action of debt, or by distress, as rents are usually recoverable in this commonwealth. The fair construction, I take it (and it is one in her favour), is to place her in the situation of a landlord, and to give her the same remedy a landlord has against a tenant. The extent of this is given in the fourteenth section of the act of 1794. First, physic, funeral expenses, and servants' wages are to be paid; and secondly, rents, not exceeding one year. Without the benefit of this construction, the widow would be only entitled to payment as a lien or judgment creditor. The remedy which the landlord may choose to adopt can not alter the case; for otherwise, in all cases where the rent was in arrear longer than one year, he would of course distrain, and in this way defeat the order of payment prescribed in the act. The rights of parties ought not to depend on the nature of the remedy, as was decided in *Lesher* v. *Levi*, 15 *Serg. & Rawle* 108. No act of the parties after the death of an intestate can vary the rights of creditors.

Judgment affirmed.

Kiehner *against* Dengler.

A terre tenant having had an opportunity to defend his title against the lien of a judgment, and not having availed himself of it, is concluded; and a purchaser at a sheriff's sale upon such judgment revived with notice to the terre tenant, is entitled to recover the land in ejectment against him.

APPEAL from the circuit court of *Schuylkill* county.

This was an action of ejectment by *William Kiehner* and *Peter Filbert* against *George Dengler*, for three acres of land.

Plaintiffs and defendants claimed title under *Jacob Dreibelbis*, in whom the land in dispute was vested the 16th of October 1799.

Plaintiffs' title founded upon the following evidence, to wit:

1819, 27th July, judgment at the suit of *Jacob Reber* against *Jacob Dreibelbis* and *Daniel Dreibelbis*, entered up to July term 1819, 400 dollars.

1828, October term, *fieri facias*, issued the 6th September 1828, levied on the land in dispute.

1828, December term, *venditioni exponas*, to which sheriff returned, land knocked down to *Berger* and others, who did not pay, and therefore unsold for want of buyers.

1829, July term, *alias venditioni exponas*, to which the sheriff returned, land sold to *William Kiehner* and *Peter Filbert*, the plaintiffs in this suit.

1829, July 23, sheriff's sale to plaintiffs, who were previously served with notice of defendants' claims.

1829, July 28, the sheriff executed a deed to the plaintiffs for the land in question.

1829, March term, *scire facias*, issued at the suit of the said *Jacob Reber* against the said *Jacob Dreibelbis* and *Daniel Dreibelbis*, to revive the said judgment for another period of five years, to which the sheriff returned, served on *Jacob Dreibelbis*, one of the defendants, and on *George Dengler*, terre tenant.

No appearance was entered for either defendants, nor for *George Dengler*.

1829, July 31, the following entry was made upon the record, to wit: on motion of *C. Loeser*, the court order that the judgment be revived for another period of five years.

Defendants, the heirs of *George Dengler*, claimed to hold the land in question by virtue of a deed of conveyance, executed the 11th of August 1828, by *Jacob Dreibelbis* to *George Dengler*, the defendants' intestate.

Upon which state of facts the court charged the jury, if *George Dengler* intended to claim and hold the land in dispute under this

deed, or by any other means, it was his duty to have appeared in court after having been served with the writ of *scire facias*, and asserted his claim; having, however, declined to do so, he is concluded and estopped from doing it now, his deed cannot avail him.

The counsel for defendants moved the court for a new trial, alleging error in the above stated charge of the court. Motion overruled, and judgment entered for plaintiffs, from which defendants appeal.

Bannon and *Biddle*, for appellant, cited, 1 *Penns. Rep.* 152.

Loeser, contra, cited, 1 *Serg. & Rawle* 540; 13 *Serg. & Rawle* 444; 17 *Serg. & Rawle* 319.

Judgment affirmed.

Adams *against* Betz.

A record cannot be contradicted, and must be tried by itself when in existence: to refer to a jury to decide the fact when a judgment was entered is error.

ERROR to the common pleas of *Berks* county.

This was a controversy between two judgment creditors of *George Dessler*. The plaintiffs claimed under a judgment entered to January term 1816, and regularly revived by *scire facias* to January term 1821. *William* and *Samuel Moore* claimed under a judgment entered in their favour against the same defendants on the 27th of October 1814, on which a *scire facias* issued the 27th day of September 1819. The court charged the jury, that "if the judgment of *William* and *Samuel Moore* was entered of August term 1814, they have lost their lien. If it was entered of November term 1814, the *scire facias* issued in due time, it was revived and continued in full force, and the defendant acted correctly in paying the net proceeds to *Samuel Moore*. The *jury must decide the fact*, whether the judgment was entered of August term 1814, or of November term 1814, from the evidence. The judgments by warrant of attorney from the 7th day of September 1814 to the 27th day of October 1814 inclusive, were entered of November term 1814. This judgment of *William* and *Samuel Moore* against *George Dessler* was among them, and the last one so entered. It appears from the record that the pen is run through November and August written above it on five pages. The declaration is headed of August term 1814, and indorsed the 22d of August 1814. If the jury believe that the judgment was entered of August term 1814 the lien was lost, as the *scire facias* issued on the 27th day of Sep-

tember 1819 after the expiration of the five years from the first day of August term 1814."

This part of the charge embodies all the principal facts on which a decision of the question presented to this court depends. There was, however, an erasure or obliteration in the caption to the declaration of August term 1814, which appeared to have been done while the prothonotary was absent on military duty during the late war, and was supposed to be in the handwriting of the late Judge *Spayd*, who officiated in the office while the prothonotary was absent.

Darling and *Baird*, for plaintiff in error.

The opinion of the Court was delivered by

Ross, J.—Three errors have been assigned. They are all one and the same in substance, only varying in the manner of being presented to the court. The only question is, was the court bound to decide, whether *Moore's* judgment was of August or November term 1814, or had they a right to refer that question to the decision of a jury? The court expressly submitted the question as a matter of fact to the jury.

I think it will scarcely be denied, that by the acts of assembly and the adjudications of the courts, the rights of judgment creditors have been rendered very doubtful, if not insecure in this state. In the effort which has been made to exonerate lands from the liens of judgments after a lapse of five years, a train of decisions has been made, almost extinguishing every description of lien on a sale by the sheriff. No one can tell what lien could now be created on land, which would not be extinguished by such a sale, unless that of a mortgage under the act of 1830. Even this act has not yet received a settled construction. It is much to be regretted that it is so obscure, as to present difficulties in giving to it a construction which will accord with the intention of the legislature. Indeed it is almost impossible to discover from it what the intention of the legislature was as respects the various cases which come before the court. It seems to me, that it would be adding greatly to the uncertainty which now exists, to suffer a jury to decide whether a judgment was entered of one term or of another, or whether an interlineation on the face of the record was made at the time of the original entry or not. It would be unsafe to do so. It would render judgments, and titles to land derived under a judgment uncertain and insecure. If this power were exercised by a jury, it is impossible to foresee the uncertainty that would be created. The priority of a judgment or mortgage would frequently depend upon the mere whim and caprice of the jury, in cases where the question arose in consequence of some correction or interlineation made in the record, and appearing on the face of it. There would be no fixed and established rule; but in each case the question of priority would be decided according to the views of the particular jury who tried the case; and thus a judgment which

may have been actually younger in its date, might be declared older than a prior mortgage or judgment. Such uncertainty would indeed be productive of much mischief; but it is not the law, and I earnestly hope never will be the law, that a jury can decide whether a record be correct or not. Highly as I appreciate the integrity and capacity of a jury to determine matters of fact, in all cases within the legitimate sphere of the functions confided to them, I am nevertheless constrained to believe, that neither their habits nor their occupations fit them for deciding questions of law. One jury could not fix a standard of decisions by which another could be governed.

The general principles of the law, applicable to this point, are thus laid down. A record imports absolute verity, and cannot be contradicted by evidence, though by a witness of the best credit. 1 *Roll. Ab.* 757. And again, records import absolute verity, and must be tried by themselves, and admit of no averment to the contrary. *Co. Lit.* 117, *b.* 260, *a;* 3 *Bl. Com.* 24, 331. If the question be as to the existence or contents of a record; the trial is by inspection of the record itself, if it be of the same court. 1 *Stark.* 150; *Burk's Executors* v. *Tregg*, 2 *Wash. Rep.* 250; 1 *Phil. Evid.* 238. The cases already quoted are sufficient to show, that where the record is in existence, it must be proved by itself, on inspection by the court, if a record of the same court; and cannot be contradicted. The case of *Dickson* v. *Fisher*, 1 *W. Black.* 664, is so applicable to the present case, that I will refer to it more particularly. It was an action for bribery at the election for members of parliament. The precept for the election had been directed to the mayor *and* commonalty, but the words "and commonalty" were struck through with a pen. The defendant offered, but was not permitted to give parol evidence to prove, that the words "and commonalty" were on the precept, and not obliterated, when the same was delivered to the mayor, and returned by him. The court decided, that parol evidence ought not to be admitted to vitiate the record, and to prove it to have been *wrong;* though it might have been admitted to prove it to be *right.* They also decided, that the precept, being found in the proper office with those words obliterated, shall be intended to have been always in that plight. This case then decides, that a record, found in the proper office, shall be intended to have been always in the same state in which it is found; and that parol evidence cannot be received to prove it is *wrong*, though it might be admitted to show it is *right.* The charge of the court is in direct contradiction to the principle laid down in this case; which is conclusive against the right of the jury to decide the question submitted to them by the court below.

In England, the minutes from which a record is afterwards made up, do not themselves constitute a record. There the record is never considered such until enrolled. It will appear by note *b* to page 238 of *Phillips's Evid.* (*Ed.* of 1820), that it has been decided, that the indorsement of the clerk of enrolments of the day of enrolments, by way of date, is part of the record, and cannot be averred against;

nor is evidence admissible to show, that *in fact* it was *enrolled* on some other day; and this, although the date be written on an *erasure*. I am aware of the *dicta* of Chief Justice *M'Kean* in 1 *Dall.* 65, on the authority of *Alleyn* 18; also of the case in 1 *Salk.* 285; 1 *Ventr.* 259, 7; 12 *Vin.* 124, 248; 2 *Roll. Ab.* 575, *pl.* 20; *Sty.* 22, 34; and *Hardr.* 120. But upon an examination of these cases, I apprehend it will be found, that the parol proof was only admitted where the record was lost, or so obliterated as not to be legible; and that any opinion which is given in these cases, as to the admission of parol evidence, can only be considered as the *dictum* of the judges, because it was not the point presented for decision. They will not be found to militate against the cases which support the doctrine, that a record cannot be contradicted, and must be tried by itself, when in existence. I am therefore of opinion, that the court erred in referring it to the jury as a fact which they must decide; and consequently the judgment must be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and *venire de novo* awarded.

Graff *against* Graybill.

A statement in an action of *assumpsit*, which is defective for want of the date when the assumption was made, is cured by a verdict; so also where the consideration for the assumption is not stated.

In an action of *assumpsit*, where the writ demanded a sum not exceeding 600 dollars, a verdict and judgment for 1300 dollars, made up of a principal less than 600 dollars and interest, is good.

Upon a statement in an action of *assumpsit*, claiming 800 dollars, the plaintiff may recover 1300 dollars, if the excess above the 800 dollars be made up of interest.

ERROR to the district court of *Lancaster* county.

All the facts of this case are fully stated in the opinion of the Court, which was delivered by

HUSTON, J.—This suit was brought in 1816 by *Jacob Graybill* to recover a sum of money. The statement of the plaintiff's claim, filed under our act of assembly, was as follows:

"This suit is brought to recover the balance due on a bond given by *Conrad Crim* and *John Speekler*, for the payment of 800 dollars to *Randal M'Clure* on the 1st of April 1815, and transferred to the plaintiff on the 12th of August 1814, which defendant promised to pay, as part of the purchase money of the house and lot of *Conrad Crim*, purchased by the defendant from *Crim*, and of which he has paid on account of the plaintiff, in the Lancaster Reading Company, 320 dollars."

We have not the evidence given to the jury, and can only conjecture what any part of it was from the expressions used by the judge in his charge to them. He says, "the plaintiff has not filed a declaration, but a statement under the act of assembly. The defendant does not demur to the statement, but desires the court to give you their opinion whether it contains a sufficient cause of action. The court give it to you as their opinion, that it does contain a cause of action on which you may find a verdict, if, on consideration of the facts in the case, you think there is a balance due to the plaintiff. If the statement be not formal, or according to the provisions of the act of assembly, the defendant can take advantage of the defect, on a motion in arrest of judgment, or on a writ of error, which is the proper mode of taking advantage of such defects.

"If you are of opinion the defendant did promise to pay the plaintiff the amount of the bond in question, or the balance due thereon, in part of the purchase money of the house and lot he had purchased of *Conrad Crim*, and that he had got credit with *Conrad Crim* for the amount of the bond, in settling the purchase money of the house and lot with him, he could not afterwards discharge himself from his promise to pay *Graybill*, by paying to *Conrad Crim* the money which he had promised to pay *Graybill*, unless *Graybill* had released him in the meantime, or given him authority to pay the money to *Conrad Crim*. Of this you will judge."

The jury found for the plaintiff 480 dollars, and interest till the time of verdict rendered 868 dollars 87 cents; in all 1348 dollars 87 cents.

There was no motion for a new trial; nor is there here any allegation of error in the charge, as it relates to the merits of the cause, on the facts; but reasons in arrest of judgment were filed and overruled, two of which are the same assigned here as errors. The third error assigned was not, so far as we see or hear, mentioned in the court below.

Errors assigned. 1. The statement filed in this cause does not state the date of the assumption, nor the amount which the plaintiff claims to be justly due from the defendant, according to the provisions of the fifth section of the act of the 21st of March 1806.

2. There is no consideration mentioned in the statement filed for the promise of the defendant, neither of benefit to the defendant, nor of trouble or prejudice to the plaintiff.

3. The verdict and judgment are erroneous, inasmuch as both are rendered for plaintiff for 868 dollars; and the summons is in debt on parol contract not exceeding 600 dollars.

The fifth section of the act of 1806 is in these words: "it shall be the duty of the plaintiff, by himself, his agent or attorney, to file in the office of the prothonotary a statement of his or their demand, particularly specifying the date of the promise, book account, note, bond, penal or single bill, or any or all of them on which the demand is founded; and the whole amount of what he, she or they believe is justly due to him, her or them, from the defendant."

It has been said this act was drawn in a spirit hostile to the profession of lawyers, and intended to enable every man to conduct his own business in court. If so, it has failed in both respects; it has not lessened the emoluments of the profession, and few men ever attempt to conduct a suit in court. The arbitration clauses and the above were perhaps intended to enable men to recover a plain debt, without the interference of lawyers.

The framers of the law had, however, other objects in view. To a common mind, a sum of money secured by a note, or due for goods sold or work performed, &c. &c., was a debt, as much as one evidenced by a note to which the maker had added a seal with ink at the end of his name; and it was intended to abolish the distinction. The counts in *assumpsit* for money had and received, for money paid, laid out and expended, for money lent and advanced, for goods sold, and for work done, &c., which all stated some day (but immaterial what day), and a sum of money as due in which there was no regard to the actual amount claimed, though well enough calculated to do justice generally, were nevertheless a great aberration from the rules of pleading, which required the narrator to state the claim, so that the defendant might know what he was to answer, and that the record of one suit might be evidence to protect the defendant from another suit for the same cause. In short, it amounted very often, in point of fact, to trying a cause without any notice of the demand. It was, however, alike in this, that the plea of *non assumpsit* often gave as little notice of the defence. It was intended that the statement, substituted for this string of counts, should inform the defendant whether the demand was a promise express or implied, a book account, a note or a specialty, or how many of them, the date and amount of each. And if the act, instead of being abused by the profession, and harshly spoken of by the courts, had met with other treatment, and attempts had been made to give it effect fairly, it would, in some respects, have been an improvement of the law, and is clearly so considered in some districts of the state, where the lawyers and the judges have endeavoured to construe it and practise under it in such way as all laws regulating practice ought to be construed and practised on. The act requires a counter statement of his defence by the defendant. This has every where been disregarded, so far as I know, except in our district; and yet nothing has a greater tendency to fairness and expedition in the trial of causes. When fairly acted on, it often leaves little to be decided by the court and jury.

All lawyers practise under this law; that is, they file statements, and too often so badly drawn that their clients could have done it as well. And statements are too often filed in cases not within the law. It has been said there is no demurrer to a statement, but this is not true, at least where a statement is filed in a case requiring a declaration; nor generally true, though perhaps the law, as was the practice before, permits an amendment after decision on a demurrer.

[Graff v. Graybill.]

This court has endeavoured to give the law a fair construction. The same nicety and precision in averments requisite in a formal declaration, have been declared not necessary in a statement; but whatever was necessary as proof, to enable a plaintiff to recover on a declaration, is also necessary to be proved on a statement, and it appears the proof was given here. 6 *Serg. & Rawle* 54; 8 *Serg. & Rawle* 263; 6 *Serg. & Rawle* 26.

The sixth section of the same act directs that no plaintiff shall be nonsuited for any informality in any statement or declaration filed, &c.; but when, in the opinion of the court, such informality will affect the merits of the cause in controversy, the plaintiff shall be admitted to amend his declaration or statement, and the defendant to alter his plea or defence, on or before the trial of the cause; and if by such attestation or amendment, the adverse party is taken by surprise, the cause shall be continued till the next court.

It has been said that this act does not vary the law on the subject of amendments, nor enlarge it; and this I agree to, with the exception that it allows amendments during the trial. Certainly, however, it leaves all the statutes of amendment in full force; they are reported to be in force by the judges of this court, to whom the matter was referred, and it has never been alleged they do not apply to causes tried on statement, as well as those tried on declaration.

The first error assigned is, that the statement does not give the date of the assumption, nor amount of the plaintiff's claim. A date was as necessary in a declaration as in a statement, but a wrong date, or no date, is expressly cured after verdict by those statutes; and so of the sum demanded: so completely so, that any date, and any sum, provided the first was before suit, and the last large enough, was good: nay, in the action of *assumpsit*, the date and sum were laid without any regard to what the proof would be; and this, which sometimes misled the defendant, was a reason for passing our act. It is not necessary, in laying a parol promise in a statement, to lay the very day which the witnesses will mention; nor, where a day is laid, is it necessary that the witness will be able to specify any. If in this case the promise had been laid on the 10th of August 1815, it would be sufficient, if proved to have been in that year, and in August, or even if the witness could not have been positive whether in July or August or September. It is often possible to prove a contract most clearly as to its terms, and yet the witness or witnesses may not be able to fix its precise date; and it never could be right so to construe an act made to facilitate the administration of justice, as to render it impossible, in half the cases in court, to proceed at all.

After verdict then, the omission of the date and sum would be cured: but the material date, viz. when he was to pay, was given—it is stated to be the 14th of April 1815; so is the sum, 800 dollars, of which the defendant is stated to have paid 320 dollars; and although the balance is not struck, that is so apparent, as that the omission to do it can not be seriously thought any defect. The de-

fendant was bound to show when the payment was made; it was his defence; and if nothing more appeared, it must be taken to have been paid on the 14th of April 1815, when the whole was due.

It is said no consideration is laid. The word consideration is not in the statement, but it is impossible to misunderstand the claim. *Crim* owed the plaintiff 800 dollars; *Crim* sold to the defendant a house and lot; and the defendant, instead of paying *Crim* for the house and lot, agreed to pay the plaintiff the 800 dollars which *Crim* owed him. The defendant got the house and lot for this money. All the averments in a declaration are not necessary in a statement. It is not stated that *Crim* agreed to this arrangement; but we believe that it was proved, not only that he agreed to it, but that on the defendant's promising to pay the plaintiff, *Crim* settled with him, and gave him credit for 800 dollars of the purchase money.

There is one other matter assigned for error. The summons was in debt not exceeding 600 dollars, and the verdict and judgment are for 868 dollars 87 cents. In a declaration, the debt would be laid to be 480 dollars and interest, and damages for the detention. In the statement the demand is for 480 dollars, payable on the 14th of April 1815, and in this state interest is always given on money due and detained. This suit was brought in 1816. There is no end to a suit in this county. The whole demand was under 600 dollars when the writ issued; procrastination has occasioned the interest to exceed that sum, and there is nothing wrong in this particular.

I do not say a plaintiff can recover a larger sum than he claims in his writ and statement. I only say he can recover that sum, and interest till the trial, if the jury find so much due to him. This was expressly decided. 8 *Serg. & Rawle* 263. The statement claimed 1525 dollars, due on the 6th of February 1816, and verdict for that sum and interest, and held good in error. The act directs that the statement shall specify the sum which the plaintiff believes is due at that time. If interest can be allowed, it must be in addition to this sum. Whether the plaintiff can in any case recover as principal more than is in the statement, is another question.

There is one other matter I will mention. After all the evidence was heard without objection, the defendant asked the court to tell the jury, that the statement did not contain a sufficient cause of action; which seems to amount to a kind of demurrer *on terms*, to be decided by the court and jury. The defendant ought to have demurred, or objected to the evidence; but as the law compelled the court to permit an amendment, this is never done; and if not done, we must take it, all objections to the statement are waived. After the evidence is closed a defendant may demur to it, or in the olden time might have asked the court to say whether the plaintiff's evidence supported his narration, and moved for a nonsuit: which it is decided in this state the court can not direct against the consent of the plaintiff. But until lately, the application to the court to direct the jury as to the sufficiency of narration or statement was never heard of, and

never ought to be heard of again. The jury have nothing to do with demurrers, oral or written, and the court ought to refuse to give them any directions on this subject. Some time or other, and I wish very soon, it will be known in this state that this court will not reverse for matters expressly cured by the statutes of jeofails; nor because our practice is already loose, make it more so by referring the decision on forms to the jury.

Judgment affirmed.

Malson *against* Fry.

If it be the opinion of the court, that all the facts given in evidence by a plaintiff, if true, fail to establish his right to recover; it is their duty so to instruct the jury. And if a jury should find a verdict against such instruction, a new trial ought to be granted.

The facts of one in possession of land having been driven from it by a flood or other accident, and when out kept out of possession by the force of an adverse claimant; although he may continue to endeavour to obtain the possession, yet the statute of limitations will be a bar to his recovery, after such adverse claimant has been in possession twenty-one years.

This court will not reverse a judgment for error in the instruction of the court below to the jury on one point, when they were right in saying, on another point, that if all the plaintiff's evidence be true, he is not in law entitled to recover.

ERROR to the district court of *Lancaster* county.

This was an action of ejectment by *Ephraim Malson* and others, heirs at law of *Thomas Malson* deceased, against *John Dritt* and *John Fry*, for three islands in the Susquehannah river in Manor township, Lancaster county, containing altogether about sixty acres. During the progress of the trial many bills of exception to the admission of evidence were taken; but the court below being of opinion, that if all the plaintiffs' evidence were true they could not recover, that point alone was decided by this court. The evidence on that subject was, that *Thomas Malson*, the father of the plaintiffs, obtained the possession of the islands in dispute and had cultivated them for some years, when he was driven from them by the "pumpkin flood" in 1784. Before he returned, *Jacob Dritt*, under whom the defendants claimed, had obtained the possession; and when *Malson* came back, *Dritt* repelled him, and kept the possession by force. At several other times *Malson* attempted to get the possession again, but always failed. The defendants, and those under whom they claim, had been in possession for forty years before this suit was brought; and the proof was, that during all this time *Malson*, and his heirs after his death, were continually exerting themselves to re-obtain the possession.

Upon this evidence as to the possession, the court below was of

opinion, that the statute of limitations was a conclusive bar to the plaintiff's recovery, and so instructed the jury, who found a verdict accordingly.

Frazer and *Champneys*, for plaintiffs in error.
Jenkins and *Hopkins*, for defendants in error.

The opinion of the Court was delivered by

KENNEDY, J.—No less than twenty errors have been assigned; but if the court below were right in answering the first point of the defendant, which is made the ground of the twelfth error, all the other matters complained of as error become immaterial and irrelevant; for even supposing there be error in some of them, yet when corrected, by no possibility could they aid the plaintiff's recovery. *Edgar* v. *Boies*, 11 *Serg. & Rawle* 450.

The answer of the district court then to the defendant's first point, was in substance a direction to the jury, that admitting all the facts and circumstances, of which the plaintiffs gave any evidence, to be true, still they had not shown such a title to the possession of the land in dispute as in law entitled them to a verdict in their favour.

This matter being assigned for error, has, as may be observed, necessarily brought up before us the whole of the evidence which was given by the plaintiffs on the trial of the cause. It also appears from the record and proceedings returned, that all the evidence offered by the plaintiffs was received, excepting the record of an indictment and the proceedings thereon, in the quarter sessions of Lancaster county, at March sessions 1828, which was clearly not admissible, and therefore very properly overruled.

To the charge of the court in this behalf, it is objected by the plaintiffs' counsel that the court withdrew the matters of fact from the decision of the jury. Doubtless wherever the facts in a case are controverted, it belongs exclusively to the jury to decide on them: *ad questionem facti juratores respondent* is the maxim. But in this case, after the plaintiffs had given all their evidence, the defendants' counsel put it to the court and jury in such a manner as to free the case from all dispute or controversy about the facts; because, in asking the court to charge the jury as they did in their first point, they are to be considered as conceding and admitting the *truth of all facts* which, upon the evidence given by the plaintiffs, *might* be found by the jury *in favour* of the plaintiffs. Now I think it cannot be denied but that it belongs to the court, as a question of law, to decide whether evidence offered to be given by a party may or can not conduce to the proof of a particular fact; otherwise courts usurp a power every day that does not belong to them, in rejecting evidence offered, because in their opinion it does not tend to prove or disprove the facts put in issue between the parties, and therefore irrelevant and not admissible. It is obvious that the trial of a cause might become interminable if the court could not exercise such a power. But to

decide upon the relevancy of the evidence, if offered by the plaintiff in support of his claim, the court must necessarily, as a question of law, decide whether the facts which the evidence has a tendency to prove, are or will be sufficient to sustain his claim. If, however, the evidence should be all given without objection, cannot the court decide as well then as if it had been objected to before it was given, what the facts are which it tends to prove, and whether or not they are in law sufficient to support the plaintiff's demand? Most unquestionably it may: and should its attention be called to the point by the counsel of the defendant, with a request to charge the jury as was done in this case, I consider it the duty of the court, when it is decidedly of opinion that the evidence given by the plaintiff, supposing it to be all true, does not tend to prove such facts as will in law entitle him to recover, to tell the jury so; or, in other words, "taking every fact and circumstance given in evidence to be true, still the plaintiff had entirely failed to make out his case." That the court might do so, was ruled expressly by this court in the case of *Weidler* v. *The Farmer's Bank of Lancaster*, 11 *Serg. & Rawle* 141. And if a jury were, after such direction from the court, to find a verdict for the plaintiff, it would be the duty of the court to set it aside and grant a new trial.

What then are the facts which the evidence given on the part of the plaintiffs in this case had a tendency to prove? In its utmost extent, it can not be claimed that it proved more than that after the land in dispute, consisting of three islands in the Susquehannah river within that part of Lancaster county in this state which was claimed by Lord *Baltimore* as a part of Maryland, had been granted by the then proprietor of Maryland, by patent dated the 22d of October 1736, to *Thomas Cressop*, who by his deed dated the 18th of March 1741 conveyed the same to *Jacob Myers* of Lancaster county, *Thomas Malson*, the father of the plaintiffs who as his heirs claim the land, was in the possession of it from fifteen to twenty years before the autumn of 1784, when a flood called the "pumpkin flood" came and compelled him to quit the possession, leaving a crop of corn growing upon it; and when he returned after the flood had abated to resume the possession, he found *Jacob Dritt* in it, who repelled him by force, drove him off, and would not let him enter. That *Jacob Dritt* from that time kept *Thomas Malson* out of the possession, and continued to possess, occupy and farm the islands by himself and his tenants, till his death in the year 1815 or 1816, when his heirs succeeded him in the possession, and continued it by themselves and their tenants till the bringing of this action on the 25th of October 1819. That in the spring after the flood *Thomas Malson* tried to get into possession, but *Jacob Dritt* prevented him, and that, as one witness said, "there had been disputes about the islands from that day to this;" and another that "the *Malsons* have been at variance with *Dritt* and his executors about his title to the islands." That during this period *Jacob Dritt* built a two story dwelling house upon one of the

islands, and a dwelling house and barn upon a second. That *Thomas Malson* died about 1813; and between 1812 and 1814 when *Jacob Dritt* was about putting a tenant of his of the name of *Shigly* into possession, he found some things of *William Malson's*, the eldest son of *Thomas Malson*, in the house, which he threw out; and some days after *William Malson* took them away. That about 1824, after the bringing of this action, *Ephraim Malson*, another son of *Thomas Malson*, was in a shanty on the island upon which *Jacob Dritt* had not built a house, having with him pots, kettles, pans, and a kind of bed. While there he was grubbing and clearing upon it, when he was forced off from it.

From this it appears that while the title and right to the land in dispute were vested in *Jacob Myers*, *Thomas Malson*, by intrusion, took the possession of it, in which he continued without shadow of title for the space of from fifteen to twenty years, when he was expelled by the flood; and *Jacob Dritt* took the possession before his return, and kept him out by force ever after. Although the possession which *Thomas Malson* had had of the land before the flood might have been sufficient to have enabled him to have maintained an action of ejectment against *Jacob Dritt* or his tenants, if he entered without title or the authority of one who had, or to have prosecuted and supported an indictment for forcible detainer; yet about twenty-eight or twenty-nine years after having thus lost the possession he died, without ever having attempted to regain it in either way. From the spring of 1785, as long as he lived, there is not a particle of testimony tending to show that he ever made an entry and claim upon the land; nor that any person did so by his authority for him.

That the possession of *Jacob Dritt* was from its commencement, and continued to be throughout, adverse and hostile to *Thomas Malson* in his claim to the land, can not admit of a shadow of doubt. That it was continuous and notorious is equally clear: in short, that it was every thing under our act of limitations to make it a complete and positive bar to the plaintiff's action is so palpable from the evidence given by the plaintiffs themselves, that the district court could scarcely be said to have administered the law, and to have discharged its duty, if it had not told the jury so. This, then, being the condition of the plaintiffs, it follows necessarily that even if there were errors committed in other matters on the trial of the cause, they can not prejudice the plaintiffs, and therefore would be no good ground for reversing the judgment upon this writ of error.

Judgment affirmed.

Commonwealth *against* Evans.

The non-payment of a debt by an administrator is not such a breach of the condition of his administration bond as will enable the creditor to sue it and recover his debt, without a previous suit fixing the administrator with a *devastavit*.

ERROR to the district court of *York* county.

This was an action of debt upon an administration bond given by the defendant, *John Evans*, esquire, upon taking out letters of administration on the estate of *F. M. Wadsworth*, esquire, deceased. The suit was brought on the 3d of November 1831; and the breach of the condition of the bond alleged by the plaintiff was, the non-payment of a debt owing by the deceased, *F. M. Wadsworth*, esquire, to *Thomas Relly*, esquire.

The plaintiff, to support the issue on his part, gave in evidence the record of a suit, No. 29, May term 1830, *Relly* v. *Evans*, *Administrator of Wadsworth;* report of arbitration thereon for plaintiff for 100 dollars; appeal by plaintiff; 21 October 1831, case stated, and judgment for defendant; writ of error by plaintiff, and, 6 June 1832, judgment reversed, and judgment for plaintiff for 150 dollars. Also the administration account of *Evans*, administrator of *Wadsworth*, settled 3 March 1831, showing a balance of 3675 dollars and 41 cents in the hands of accountant.

The defendant then proved that he was advised by counsel to make defence in the case of *Relly* v. *Evans*, *Administrator of Wadsworth;* that it was litigated before arbitrators in the district and supreme court while the present suit was pending. To this evidence the plaintiff demurred, and the defendant joined in the demurrer, which gave rise to the question, whether the plaintiff was entitled to recover upon the evidence given in this suit. The district court was of opinion, that the plaintiff was not entitled to recover; and gave judgment for the defendant, which was the subject of the assignment of error in this suit.

Durkee, for plaintiff in error, cited, *Gord. Dec.* 293; 1 *Salk.* 316.

Hambly and *Gardner*, contra, cited, 4 *Johns. Cha. Rep.* 628; 5 *Binn.* 140; 13 *Johns. Rep.* 440; 5 *Dane* 261; 16 *Mass.* 524; 1 *Munf.* 31; *Halstead* 195; 9 *Serg. & Rawle* 67; 13 *Serg. & Rawle* 238; 1 *Johns. Rep.* 311; 8 *Mass.* 488.

The opinion of the Court was delivered by

Gibson, C. J.—The condition alleged to have been broken, is the

second in the series as prescribed by the legislature, to wit, that the administrator will well and truly *administer according to law* the goods, chattels and credits of the deceased, which shall come to his hands; and we are called upon to give these words an original judicial construction. It was indeed said in *Yard* v. *Lea's Administrators*, 3 *Yeates* 345, that the bond is a security for creditors as well as the next of kin; but without intimating the nature of this particular condition, or of its breach. The construction seems to have been different in England, where it was at one time held, that the clause in question extends but to the bringing in of an account, and not to the payment of debts; consequently, that a creditor may not have the bond assigned to him, and allege non-payment of his debt, or a *devastavit* as a breach of it. *Archbishop of Canterbury* v. *Wills*, 1 *Salk.* 315. And in *Wallis* v. *Ripon*, *Amb.* 183, it was held by Lord *Hardwicke*, that none but the next of kin can sue on an administration bond given pursuant to the 22d and 23d *Car.* 2, from which our statute is taken; though it was admitted to be otherwise in respect to the bond given by an administrator *pendente lite*. These cases, however, seem to have been overruled in the *Archbishop of Canterbury* v. *House*, *Cowp.* 141, where it was determined, that an action may be maintained by a creditor as well as the next of kin. How the breach of the condition was assigned, does not distinctly appear; but the nature of it may be conjectured from the remark of Lord *Mansfield*, that the administrator had attempted to defeat the creditors by "all sorts of chicane, delay and false pleading"—matters that constitute a clear *devastavit*. In Pennsylvania, the precise meaning of the clause in question has not been judicially determined, and it is now to be fixed by a recurrence to general rules of construction.

It is a cardinal principle that contracts are to be expounded as the parties themselves expounded them; and the meaning of the parties is presumed to be the meaning assigned to the same sort of contracts by the rest of the world. Where a particular interpretation has been universal, it ought to govern, though it be irreconcilable to the legal effect of the letter; as in the case of a policy of insurance or a mortgage. What then is the effect universally ascribed to this condition by the profession and the people? No surety in an administration bond ever agreed to contract an absolute instead of a contingent liability, or supposed that he subjected himself to immediate recourse as a principal debtor. That this assertion is borne out by the popular and professional understanding, will not be disputed by those who are familiar with the business of the register's office; indeed its truth is proved by the very fact, that in no instance but the present has there been an attempt to recover on proof of any thing less than a *devastavit*. And this understanding was the understanding of the legislature, who evidently designed to do no more than enlarge the field of personal recourse, by adding the responsibility of a surety to the existing responsibility of the administrator; without changing the quality or condition of it at the common law, which turns the contin-

gent liability of an administrator, as well as of an executor, into an absolute one, only as a penalty for a *devastavit*. Why then should a surety be held to harder terms than the common law had imposed on his principal, whose body or estate could not be subjected to satisfaction before it were judicially ascertained that the assets were no longer to be reached by an execution? That such was not the object of the legislature, is manifest from the provisions in respect to the additional bond exacted in certain cases of delinquency by the act of 1797; an action on which is required to be preceded by a return of *nulla bona* on an execution against the executor or administrator in his representative character. Not only therefore does the object and reason of the statute define the meaning of the particular clause, but the limit assigned to the contract of the surety in a parallel case equally indicates the legislative intent; and with the principle extracted from these sources, the decisions on the subject in our sister states, are entirely consistent. In *Robbins* v. *Haywood*, 16 *Mass.* 127, it was held, that a creditor whose debt has been but barely ascertained by a judgment, may be permitted to sue the administration bond; but the contest had respect rather to the disclosure of such an interest in the assets as entitled the plaintiff to intermeddle, than to what constituted a breach of the bond: besides, the conditions prescribed by the statute of Massachusetts seem to be different from ours. In the *People* v. *Dunlap*, 13 *Johns.* 440, where the words of the condition were the same as they are here, the statute of New York also having been taken from the 22d and 23d *Car.* 2, there had been a previous execution and return of *nulla bona*. And in *Gordon's Administrators* v. *The Justices of Frederick*, 1 *Munf.* 1, as well as in several other cases in Virginia, it was determined that no action could be maintained on an administration bond for a breach of this condition, without a previous suit fixing the administrator with a *devastavit*. What then is the evidence of a breach here? The plaintiff showed the record of an action by a creditor against the administrator, which, at the inception of the present suit, had been decided by the district court in favour of the administrator, and was depending in this court on a writ of error; and he showed no more. Could it, under these circumstances, be a *devastavit*, or even an indelicacy to withhold payment till the right were determined by the court of the last resort? Assuredly the situation of the administrator called for circumspection, and the law is not so unreasonable as to require him to act at his peril, and with a promptness that would be precipitation in any other transaction. The evidence, therefore, failed to show a breach of the condition, and the demurrer was properly sustained.

Judgment affirmed.

Marshall *against* Hoff.

H., executor of B., sold the real estate of his testator and took bonds for the purchase money, which remained in his hands until he died intestate and insolvent. Held, that the estate of the testator which came to the hands of the administrator of the executor, should be appropriated by him for the benefit of the estate of the testator, and not to the creditors of the insolvent executor.

APPEAL from the decree of the orphan's court of *Berks* county, making distribution of the money in the hands of *Jacob Hoff* and *Catherine Hoff*, administrators of *John Hoff* deceased.

Jacob Bright died seised of real estate, having made his will, by which he authorised his executor, *John Hoff*, to sell his said estate for certain purposes therein directed. The estate was sold, and *John Hoff* the executor took bonds and mortgage for the payment of part of the purchase money, and subsequently settled an account, charging himself with the said purchase money, by which there was found to be a balance in his hands of 13,195 dollars. *John Hoff* placed these bonds and mortgage in the hands of *Marks J. Biddle*, Esq. for collection, and died. Letters of administration on his estate issued to *Jacob* and *Catherine Hoff*, who received from *Marks J. Biddle*, Esq., their attorney, 1750 dollars of the money which he had collected on the said bonds and mortgage. These administrators settled an account of their administration of the estate of *John Hoff* deceased, in which they charged themselves with the money thus received. This account was referred by the orphan's court to auditors, to settle the same and make distribution among the creditors, who made a report giving a preference to the specialty creditors of *John Hoff* deceased, over the administrator *de bonis non* with the will annexed of *Jacob Bright* deceased, who claimed for the benefit of the estate he represented all the assets which belonged to it. This report was confirmed by the orphan's court, upon exceptions filed to it, which were in substance, that the court erred in not decreeing to the estate of *Jacob Bright* deceased the money which was collected by *Marks J. Biddle*, Esq. and paid over to the administrators of *John Hoff* deceased.

Smith, for appellant, cited, 2 *Serg. & Rawle* 521; 15 *Serg. & Rawle* 145; 2 *Rawle* 121; *Ashm. Rep.* 319.

Biddle, contra, cited, 6 *Serg. & Rawle* 462; 7 *Serg. & Rawle* 483; 11 *Vin. Ab.* 430, *pl.* 16; 11 *Serg. & Rawle* 377, 385.

The opinion of the Court was delivered by

Gibson, C. J.—The administrators of *John Hoff* can administer

the funds in their hands derived from the estate of *Jacob Bright* in no way more advantageously to *Hoff's* creditors than he himself could do were he alive; and the question is, what would be their recourse against him in a court of equity, to whose jurisdiction the subject belongs? It is plain that he could not make the assets his own, to defeat the purposes of the will, by charging the value in his account: a chancellor would, notwithstanding, lay hold on the funds in the hands of the insolvent executor. Even take it that he had already paid them away to his creditors with a knowledge on their part of his insolvency and consequent misapplication of the fund, nothing is clearer than that as parties to the *devastavit*, a court of equity would compel them to refund. This principle is amply established by *Burting* v. *Stonard* and *Ewer* v. *Corbel*, 2 *P. Wms* 148, 149; *Nugent* v. *Gifford*, 1 *Atk.* 143; *Meade* v. *Lord Orrery*, 1 *Atk.* 235; *Jacomb* v. *Harwood*, 2 *Ves.* 265; *Crane* v. *Drake*, 2 *Vern.* 616; and *Tanner* v. *Ivie*, 2 *Vern.* 469. And the consequence is the same when the assets have been turned into money, provided it has been received with a knowledge of all the circumstances; for when received *mala fide*, it may be followed as readily as a chattel. Now the case here is certainly no stronger for the creditors, than that of payment actually made with a knowledge of its being a misapplication of the fund. The creditors of *John Hoff*, the executor, claim to be satisfied out of a fund which, though recoverable at law only by his administrators, notoriously belongs in equity to the estate of his testator; and as a chancellor would take particular pains to disappoint them, this court, sitting as a court of equity, can do no less. It is therefore ordered that the account be re-stated, so as to exclude from it all moneys received by the accountants from any person indebted to their intestate, as the executor of *Jacob Bright;* and that the accountants be decreed to hold those moneys in trust for the persons entitled to the same under the will of the said *Jacob Bright;* and that the record be remitted to the orphan's court to have this decree carried into execution.

Decree accordingly.

Rohrer *against* Stehman.

In Pennsylvania, it is not necessary to the validity of a devise that the will should be sealed; nor that it should be proved by subscribing witnesses.

A memorandum, taken in writing, from the mouth of a testator, for the purpose of drawing from it a formal will, and read over to him and approved, may be proved as a will.

ISSUE of *devisavit vel non*, on an instrument of writing, purporting to be the last will and testament of *Tobias Stehman* deceased. *John Hubley*, a scrivener, was sent for to write the will of *Tobias Stehman*. He took down in writing what the testator dictated to be his will; and when it was all done he read it over to him, and it was approved. From this memorandum a formal will was drawn by *John Hubley*, and executed by *Tobias Stehman* in the presence of witnesses, who subscribed it as such; but when it was offered for probate, a *caveat* was entered, an issue joined, which was tried, and a verdict and judgment rendered against the will, on the ground that it had not been read to the testator previously to its execution. The memorandum taken by *John Hubley* was then offered for probate, and its validity was the subject of this issue.

The following evidence was then given.

This cause being at issue and the jury sworn, *prout* the record, the plaintiff to maintain the issue on his part, produced *Frederick Fehl* as a witness, who, being duly sworn according to law, testified as follows.

"I have been present in the year 1814, when the notes were drawing by *Hubley*—Nov. 1814, 14th of November 1814, drawn by *John Hubley*. I had orders to come to *Tobias Stehman*, the 13th, to come the next morning, which would be the 14th. I went very early in the morning. I knocked at the chamber door, and he, *Tobias Stehman* asked me to come in. I went in; said he, You come very early. I said I had word to come very early. I asked him what was the reason for it. He told me he had a mind to make another will to-day. I asked him then what is the reason: he told me he does not like that will, he wanted to make a new one. I said, Mr *Stehman*, I would leave it by the old will; well, he again asked me if I would not draw the minutes in German. I said first and foremost, I cannot write a will; then he asked me to write the minutes in German; says he, *Hubley* will be here about two o'clock, and he had to pick the notes and put them in English. Well, about that time the house was full of people, his own, and comers and goers, about breakfast time. Well, then he called for his wife to come into the room where he lay. She came in; then he said to her, to go into the room and tell the people

to go out of the house and lock the door. Well, then she done so; she returned into the chamber room, and said they were all out, and locked the door. Well, then said he, Mammy, now take a sheet of paper and ink, and a feather, and set alongside a little table, and set it aside the bed. Well, says he, *Frederick*, take a chair and set down, and mammy, said he, you take a chair and set alongside the bed. Well, then I asked him what I should set down first. Well, says he, I should set down one hundred acres in the Long lane, which I bought of *Daniel Brenneman*. When I had set down that, then he said, Have you set down that? I said I had. Well, then says he, I think there are thirty-five acres of woodland about a mile off the one hundred acres. When I had set down, I asked him what wood; he said, I bought fifty-two acres of *Samuel Simpson* of Martick township; I should set down the fifth part of twenty-five acres. When I had set down that, he said, That is all the land my grandson shall have. Next, he was saying he had two hundred acres lying on the west side of the road leading from Millerstown to his mill, and from thence to Safe Harbour road. He meant to make four lots of the two hundred acres. Well, he said, there is a sawmill on one of the lots; that same lot he thought *Betsey*, his daughter, should have; that was the east lot; and the next lot, north-west, towards the mill, should be *Kitty's*. And for the other two lots adjoining lands of *Jacob Fehl*, there were two girls he had, *Veronica* and *Peggy*, they should cast lots for them. And the court should value these—four or five men to value the lots—get it appraised. The highest lots they should make up, so that they should come equally in the money way; they should come out equal. Next, he was saying, he allowed there were three hundred acres on the east side of Millerstown road, where he resided. He allowed two hundred acres that his son *Tobias* should have, and the half of the house on the east side, and have to give out 2000 pounds to four of the sisters, and should have the whole team of horses. I think there were four horses, with the gears, wagon, cloth and hand-screw: he should have the apple mill and windmill, and blacksmith's tools; should have three steers, four cows, or three cows and two beds and bedsteads; however, he said he should be furnished off with every thing like his eldest son. Next, was the ten acres. I should set down ten acres adjoining lands of *Kitty's* lot, which was erected on the ten acres a two story dwelling house: this was lying on the west side of Millerstown road, leading to Safe Harbour, adjoining Conestoga. Then he, I think that time *George Zeigler* came there, we broke up and set it on aside; when he came, my mother had been very sick, about a mile from *Stehman's*. I asked *Stehman* if I could not go to see my mother; he said, Yes, you have time enough; for *Zeigler* and he had something to talk about other things, and I might go. I went. I stayed at my mother's till two o'clock, and then went to Mr *Stehman's*. When I came there Mr *Zeigler* had been there yet. They wished to stay longer together. It was near three o'clock before *Zeigler* started. So he said, now I

should begin at the will; *Tobias* said this I should set down: ninety acres on the east side of Millerstown road; about that time somebody knocked at the door, which was locked; Mrs *Stehman* went and looked; it was *John Hubley;* he came in; as soon as he was in, *Hubley* said, Have you done any thing in the business? I said, Yes, we had done a little; and I took it to him and told him, Here is the business we have done. He took it in his hand and looked over it; *Hubley* did. He then asked for a loose sheet of paper; *Hubley* did; and laid the notes I had made, down; some was right and some was not; and he made it in better style in English. He began at the place were I finished, about the mill. So he asked *Stehman* what was to be done with the mill; ninety acres were set down already. The mill, and all the implements belonging to it, and all that was in it, the ninety acres, the ten acres, and the mill, and the dwelling house, that is what I will keep till I die; and after my decease, or if I should die, my wife should have it as long as she lives; if she should die, his son *Tobias* should have all this if he gets boys; and if he don't get no boys, his eldest son's son should have it—the mill, one hundred acres and dwelling house. If that boy, *Tobias,* should die before he was twenty-one, his brother, *Christy,* was to have it; and if *Christy* should die under age, then *John* should have it; and if *John* should die under age, *Jacob* should have it: and if they should all die under age, the mill and one hundred acres should be sold, and the money should be divided among his own children. That was the last; then it was read by *Hubley*—the minutes; when it was reading, his wife was by; says she, There is something forgot about the mill—it was not valued; she was saying about 2000 pounds; he did not give her an answer on that; so he was considering. He said, I don't know how to do about that. Then I was saying to him, I heard *Zeigler* once saying *Christy Rohrer* would willingly give 5000 pounds for the mill, and fifty acres, and the dwelling house; then he began to laugh a little—to smile; then we were talking how the money would be at that time; it might be very scarce; then he said it must be valued whoever gets it; it must be valued at the time he gets it; then *Hubley* lined it in the notes, that whoever gets it, it must be valued to; it must be valued by men to be appointed by the court. Well, it was read over again by *Hubley*—the whole. Well, said *Stehman,* now it is right; and he told Mr *Hubley* to do it by to-morrow for him, according to law. *Hubley* made an excuse, said he could not to-morrow, he had some business on the turnpike. Well, *Stehman* told him to do it as soon as possible. *Hubley* promised he would. Then *Hubley* asked him who should be the executors; he fixed out his right hand, and pointed with his finger against me; he said, *Frederick Fehl* should be one, and his son, *Tobias,* second, and *Jacob Fehl* the third; so it was dark—almost dark. He called the wife to get a little water and wine; we refused; did not drink any, saying there was no need. We bid good night to

him, shook hands and went off. Mr *Hubley* and I went away together.

"*Stehman* lived about a mile beyond Millerstown. He was at that time in good health. He thought himself to live at the mill. He was at that time confined to his bed by a sort of a fever—no pain.

"As to memory and understanding, I could see no odds, like as in the times when he was well and hearty.

"Mr *Hubley* read the minutes over twice; he read it word for word like; he asked him sometimes, when it was a little queery—he asked him if he understood that, and he said Yes. I mean by *queery* some words which Mr *Hubley* thought he could not understand; he explained it to him, and he said he was satisfied.

"The last time he read it he explained some words he did not the first time; he said it was all right after it was read the second time. I did not see him from that time till the 22d of November, he was then pretty weakly; he was very glad to see me; glad I came to see him; he was well in his memory and understanding. He did not say any thing about these minutes. [Shown the notes.] I think this is the very paper *Hubley* wrote; I did not see it since that day; this is the paper he wrote in my presence and read to the old man, and when it was read, he said it was all right; I think it is the paper to the best of my knowledge."

Cross-examined. "I and he married sisters; I cannot read English writing well; I did not read the minutes that *John Hubley* wrote; I never had them in my hand before to-day; I know it by the letters of his handwriting; I am not acquainted with the handwriting of Mr *Hubley*, but think this is the very writings he drew that day." Asked, why? "I think so because I saw it that day when *Hubley* read it; that is all the reason I have for thinking this is the paper; no mark on the paper by which I know it to be the paper; did not take notice at the time of any marks. *John Hubley* put them in his pocket and took them away that day; from that time to this I have not seen them; I cannot read this handwriting at all; Mr *Stehman* agreed to them when read a second time. The substance that was communicated to Mr *Hubley* was the same with what was read, except the style was altered. The substance communicated to me, *Hubley* picked out the best of it, and asked *Stehman* if it was right, and he said Yes. *Hubley* spoke to him in the German, and he spoke German to *Hubley* and I also; we all spoke German; Mr *Hubley* read it in English to Mr *Stehman* the first and second time; he explained the queery words in German; Mr *Stehman* understood English, but could not read or write English; the last time he read it slowly and carefully."

"Mr *Stehman* died 25th or 26th of November 1814. *Tobias*, his eldest son, was then above age; twenty-three or twenty-four; always lived with his father; he was very industrious; his father had a great liking to him."

[Rohrer v. Stehman.]

The counsel for the defendants admit that the notes now produced are in the handwriting of the late *John Hubley*, Esq.

The plaintiffs then offered *Jacob Fehl* as a witness; who being sworn according to law, testified as follows.

"I went to the doctor's always when he (Mr *Stehman*) was sick. He was eleven or twelve weeks sick; he sent his daughter for me; I went there between nine and ten o'clock; his wife gave me a wink that I should come to him—into the room to him; I asked him how he was; said he was not quite well, but a great deal better than he had been. He said he had made a will but it never should stand; that was the first will *Gloninger* had made; he said I should go to *John Hubley*, he should come out and draw me another will. I said, *Tobias*, I do not like to do such business; he said I should go, and be afraid of nobody; I took his horse and went to Mr *Hubley's* office; he was sitting there; I told him; he said he could not go to-day, he would try to get out the day after to-morrow; I must try to get somebody to do it in German, and that I must tell *Tobias*; he said he could write English or German. I told this to Mr *Stehman*; Mr *Stehman* called in *Frederick Fehl's* son, and told him to tell his father to come over very early in the morning; I was with Mr *Stehman* till twelve o'clock in the night; he told me I should come out in the morning again; *Frederick Fehl* would be there early; I went home; when I came out *Frederick* was drawing the writing in German; he was in bed, and his wife was sitting there; when *Frederick* heard somebody was coming, he took the papers up and stopped; the old man said I knew what they were doing; I went in; he had done with the grandchildren; I said he might make his will as he liked. *Frederick* read it to me; then he said I will begin about the four hundred acres which the four daughters should have; then he was considering a little whether *Betsey* or *Kitty* should have the sawmill and the fifty acres. He said *Betsey* should have it; he said *Kitty* should have fifty acres of the land going down to the mill; as to *Fanny* and *Peggy* they were single, and if they married they should draw lots for the choice of the other two; then if they should not agree they should get five men to appraise it, if one should be of more value than the other; that they should have an equal share in money; then he was done with that, and he said he would go to the house where he lived; two hundred acres of land; he said *Tobias* should have them two hundred acres more or less; he should give three thousand pounds out to the girls; then *Frederick* stood up and said Hoi! Hoi! and he then said two thousand pounds; he said that should be among my four daughters, *Betsey* and *Kitty* and *Fanny* and *Peggy;* half of the house he lived in he made to his wife, and I don't know what all, and horse and bridle; *Tobias* should feed it and haul the fire wood and make it fine for her, six barrels of cider, and she should go into the orchard and pick as many apples as she pleased, and the gardens and one thing and another, I cannot just name it all; he said if she cannot live with her son *Tobias*, she might

rent it away if he did not use her like another; that was done; then he began about the ninety acres, and the mill, and the ten acres, and the new house; then as he was speaking about it who should come riding but *George Zeigler*; he was speaking then and he said, This mill and the ten acres, and the ninety acres belongs to my wife, and she can move to the mill if I don't come down or rent it out—she should do what she pleased with it—she was to have it as long as she was alive. If her son-in-law, *Rohrer*, used her well, she could stay there too if she choose—a piece of it; if *Tobias* gets a boy before his mother died he should have the mill; if he should not get a boy it should fall to *John Stehman;* and if that one should die under age it should fall to *Christy;* if he should die under age it should go to *Johnny;* if that one died under age it should go to *Jacob;* then it should be appraised by five men to be appointed. If one gets hold of the mill, they should have five men appointed by the court to appraise the mill, the ninety acres and the ten acres and the new dwelling house, and that should be made into six shares, and every one was to have a share. His debts should be paid, and the overplus to be divided among his own children and grandchildren in equal shares in money; the two single daughters were to be furnished like *Dietrich's* wife and *Rohrer's* wife, each 500 dollars, to be taken first out of the personal property. Then *Zeigler* was coming, and he said he would quit it a little, and I went away, my mother was sick. If *Tobias* was to have a son at any time during his life *Tobias* was to have it, and it was to be appraised by men; the court was to appoint the men if they could not agree. The day after *Hubley* was there I went there. He said he was glad *Hubley* was there, he was drawing the will in town; took the papers there. He said *Hubley* would be out again, but I should ride in and tell Mr *Hubley* to make his will ready, what he was writing, to make haste and make this thing ready, these papers that he took off ready; then he said I should tell *Hubley* to put the grain in it if he forgot it; *Tobias* was to have it; I should tell *Hubley* so; I told *Hubley*; *Hubley* said he was very glad I had come, he said he had it in his minutes that the girls should have 500 pounds every one out of the two hundred acres; then I rode home and told *Tobias Hubley* did not know rightly about; he said, The dumb old man, don't he know that the girls were to have 500 pounds each out of the two hundred acres. Then I went into *Hubley* and he brought me the paper, such a paper as this. He looked into it and said, Yes, the girls are to have 500 pounds a-piece. Mr *Stehman* told me to tell *Hubley* if he was done he should bring the will out; he gave it to me and I took it out; he said in the morning he would be out to read it to him if he was well enough, and I should tell *Stehman* so; I gave it to *Stehman*; he said I should call all the children in; I think this is the paper I gave to him, and he had this paper; all were there but *Kitty*, and he said, This is now my last will. *Henry Rohrer* was there, and he sent for *Michael Rathfon*, and *Henry Gall* came in too; then he signed it, put

his name down, and said, Thank God I made my will; then *Michael Rathfon* and *Henry Rohrer* and *Henry Gall*, as witnesses. It was not read to him—nobody there could read English. He thought it was all right; two weeks afterwards he died. *Tobias* was twenty-seven or twenty-eight or thirty when his father died; he lived all along with his father; was an industrious man."

Cross-examined. "He did not give me a paper to carry to Mr *Hubley*. I do not remember it."

The plaintiff then produced *Henry Gall* as a witness, who, being duly sworn according to law, testified as follows:

"I lived with Mr *Tobias Stehman* about sixteen years; young *Tobias* lived with him all the time. To the best of my knowledge he was twenty-eight or twenty-nine when his father died. His son and all the tenants helped to put up the mill; worked at it. I was there when the old man signed the will; it was not read to him; nobody could read it without the son could; signed by him and by me without being read to him. *Tobias* was always industrious, worked on steady from the time I was there. [Shown a writing.] This is my handwriting; *Tobias* declared this to be his will. *Rathfon* died and *Rohrer* is dead. He was of sound mind then. This is the paper that was not read to them."

The following deposition of *John Hubley* was then read.

"In pursuance of the hereto annexed rule of court, personally appeared before me *Samuel Carpenter*, one of the aldermen of the city of Lancaster, in the said county of Lancaster, *John Hubley*, Esq. who being duly sworn according to law, deposeth and saith, that he took the notes on the paper hereto attached, marked A, and that those notes were taken for the purpose of drawing the last will of *Tobias Stehman* by them; he saith, that he could not say whether they were taken in the said *Stehman's* last sickness, but *Stehman* did not live long afterwards, but how long he could not tell; but that the said *Stehman* when the notes were taken, was then of sound mind, memory and understanding, to the best of his knowledge and belief; and that he corrected the said notes and read them over again; he, *Stehman*, gave him, deponent, to understand that he was satisfied with the notes. That those notes which he read over to *Stehman* as aforesaid, meaning these notes hereto attached, marked A, are the same notes, and that he believes them to be the same as they were then. And deponent further saith, that there was a great deal of conversation at that time, and that deponent supposed that he would be able to write the will from those explanatory observations and the minutes taken by him, but that the deponent does not now recollect what those explanatory observations were; that those explanatory observations were made at and after the notes were read to *Stehman* the second time."

Cross-examination. "At the time of taking these minutes was it not understood, both by you and the testator, that they were not to be considered as his will, but a mere memorandum from which you

were to draw an instrument of writing, afterwards to be executed by the testator as his will?"

Answer. "It was so understood."

Question. "Had not *Frederick Fehl* taken some notes in German in respect to the will of *Tobias Stehman* before you came to Mr *Stehman's*?" Answer. "Yes, *Fehl* had begun when I came, but had not proceeded far, but I had nothing to do with the notes taken by *Fehl*. Mr *Stehman* sat up in bed and took a snuff occasionally. I did not conceive him to be so very ill. The query appearing in the notes was made the same time the notes were drawn to the best of my knowledge."

Question. "If the query had been added at the same time, why was it put down at all?" Answer. "The query was merely put down to know how the 2000 pounds were to be distributed, that they were to be divided between four daughters."

Question. "Are you positive that the query attached to the notes was put down at the time of taking the notes?" Answer. "I am not positive."

Question. "Might not that query have been added to those minutes after you came home?" Answer. "It might, but I think not, because I had bad ink at *Stehman's*, and had good ink at home."

Question. "Did you not inquire of *Jacob Fehl* whether some money should not be paid out of the land given to *John's* children?" Answer. "*Jacob Fehl* came to Lancaster after the minutes had been taken, and I made that inquiry of *Jacob Fehl*. To the best of my knowledge *Jacob Fehl* said he knew nothing about it, but that he would inquire of *Tobias Stehman*. *Jacob Fehl* afterwards came in, and brought a small paper which I did not understand, which was mislaid and not since found, and whether that was the answer of *Stehman* he could not tell; *Stehman's* name was not to it. I cannot tell when the word No, in the query, was put there. I cannot tell whether the word No, was put to the query after the inquiry was made of *Fehl* or not. That the minutes were so dark in some places that he had to run his pen over them when he came home to make them plainer. I cannot tell what the meaning of the cross opposite the letter B is. I cannot tell whether that part with the cross was considered as part of the minutes or not. I afterwards drew an instrument of writing, purporting to be the will of *Tobias Stehman*, and sent it out by *Jacob Fehl*, and told him to read it or have it read to Mr *Stehman*, and if the instrument was not right he should just let me know, that I would come out and make it right. The instrument of writing purporting to be the last will of Mr *Stehman* was drawn from the said minutes, and the explanatory observations made at the time of taking the minutes. The said minutes were merely intended to assist my recollection. And the said instrument of writing was drawn from my recollection of the said minutes. My memory is very imperfect at present, but at the time of drawing the will my memory was tolerably good. I was then an old man."

[Rohrer v. Stehman.]

The plaintiff then produced *Molton C. Rogers* as a witness, who, being duly sworn according to law, testified as follows.

[Shown the minutes.] "I attended the taking the deposition of Mr *Hubley*, which has been read in evidence. There was a paper produced, but whether this is the paper I will not undertake to swear. I think the paper which was produced in the handwriting of Mr *Hubley;* it was brought there for the purpose of being proved as the last will and testament of *Tobias Stehman*. I don't know where it was brought from, nor do I know who brought it. I don't recollect any thing about it being said to be brought from the register's office. [Opened and shown letter B.] I cross-examined Mr *Hubley* at that time. [Asked to turn to the part where B is referred to.] I have no recollection of any reference but what appears here in Mr *Hubley's* deposition; it appears from this that I cross-examined him; I have no doubt that I cross-examined Mr *Hubley*, and put this question to him; but whether the instrument of writing was marked B by Mr *Carpenter*, or how the B came, or whether it was put upon that instrument [the minutes] I don't know. What is on the face of the deposition was taken down in my presence. I have no doubt the deposition was taken down fairly and correctly at the time. I have no doubt there was a letter B on the instrument of writing at the time, or that it was placed there, and that on putting that question I had reference to it." "Have you any doubt but that the B placed on the minutes is the B referred to in the question and answer?" Answer. "If this paper was the paper that was there, I have no doubt that the B on the paper is the one referred to in my question, but I don't know that this is the paper. I believe this is the paper that was there, I mean the minutes. My only reason for believing that it is the paper, is from what I see on the deposition of *John Hubley*, and from supposing that Mr *Frazer* would hardly bring any other paper to be proved. I never knew of any other paper drawn by Mr *Hubley* as the minutes of the will of Mr *Stehman* but that paper. I don't know that that was drawn; never knew any other exhibited or pretended to be the minutes of the will of *Tobias Stehman* but that one."

[Shown letter A.] "Have you any doubt that that letter was put on the deposition at the time of the examination for the purpose of marking the paper of which Mr *Hubley* was speaking?" Answer. "I doubt it very much. I do not think it was. I have no recollection of the paper being marked with the letter A, or any other letter. I judge of it merely from what appears upon that paper. It don't look to me like a mode of authenticating any instrument. I don't know whose letter it is. I don't know whether it is the letter of Mr *Hubley*, or of the squire, or whose writing it is. Indeed, I am not a good judge of handwriting. It don't look like the writing of the squire. I have no recollection whatever respecting it. I don't recollect that it was identified in any way. I have no doubt that the deposition and letter A were fairly and correctly done, but whether

Mr *Carpenter* put the letter A on the instrument of writing, I have no recollection whatever. We all know how depositions are taken. Sometimes the reference is put before, and sometimes after. Mr *Carpenter* intended, I have no doubt, to put the letter A, but whether he did or not I don't know. If it had been there before, it would have been identified as well as if put there at that time."

Question. "Are these the same minutes which were used by *Christian Rohrer* on the trial of ejectment, *Stehman* v. *Rohrer*?"

The plaintiff again produced *Frederick Fehl*, who, being duly sworn, deposed as follows.

"I was present when the deposition of Mr *Hubley* was taken. I was subpœnaed by Squire *Carpenter*. It was allowed Mr *Rogers* had the minutes. These were there." Is this the paper that was there? "I was not so near. Mr *Rogers* had the papers in his hands, which it is allowed were the minutes; I cannot tell whether this was the paper or not. I was not near enough to be able to tell. I cannot tell where the paper was brought from; *Rogers* brought it; he had it in his hands when I saw it. Mr *Hubley* spoke of this paper, or this one he drew. Mr *Rogers* examined him. I think I was there from three o'clock till dusk. I saw no paper there but the one. *Rogers* wanted to examine Mr *Hubley* before he was qualified; then *Hubley* said he must be qualified first. It was such a paper as this. There was an examination by Mr *Rogers*, why it, some of it, was written so small; he was asked why there were so many flashes in it, so many blots in it; he said the pen was so dull; was not good."

Cross-examined. "Never saw these minutes before except at *Stehman's*, unless at Squire *Carpenter's*. I cannot tell whether the paper I saw at Squire *Carpenter's* was the same I saw at *Stehman's*, but by all the many examinations it must have been the same as that drawn at *Stehman's*. I never had that paper in my hands; I never read it in my life; I could not read it if I were to try; I can write English in common; it would take me some time to study over it; to the best of my knowledge the paper I saw at *Carpenter's* was the same I saw at *Stehman's*; I think this is the paper I had yesterday morning."

The plaintiff then produced *John Bachman* as a witness, who, being duly affirmed according to law, deposed as follows.

"I cannot recollect; I know it was taken out of the office frequently; but don't remember that it was taken out for the purpose of examining Mr *Hubley*. Don't recollect going down to Squire *Carpenter's* with it; I might have gone, but don't recollect it."

The counsel for the plaintiff then and there, further to maintain the issue on their part, offered to read the minutes taken by *John Hubley*, Esq. on the 14th of November 1814, *prout* the same. The counsel of the defendants objected thereto; and the court, after argument, overruled their objection and admitted the said minutes to be read in evidence to the jury. To which opinion of the court the counsel for the defendants excepted.

These minutes were then read.

[Rohrer v. Stehman.]

6) 2000 (333. 6. 8.
18 6.
20 2000. 0. 0.
18
20
18
2 40.
36.
4.

"Tobias Stehman, Conest^e^ Bequeaths to Tobias Steman, Christian, John, Jacob, the children of my son John, his plantation and tract of land which he bought of Dan^l^ Breneman, containing about 133. acres, to hold to them in fee, to be valued by 5. men to be appointed by the orph^s'^ court at the valuation whereof if it can not be be divided ~~to a~~ into two three or four parts ∧ by ~~men~~ 5. men to be appr^d^ after death, marriage or removal from the premises of widow subject to the widow (John) dower ~~to be divided by the O. C.~~ the whole to be appraised & the eldest thereln son to have his choice, then the next son & after him the youngest with ∧ 5^th^ part of the 28. acres wood l^d^ a

"Bequeaths ~~the~~ ∧ his mansion house & the place thereto be- to Tobias Steman his son adj^lng^ Jacob Bare & John Bare & others longing ∧ conta^g^ abo^t^ 200. acres more or less, in fee—also 5. horses & the gears to them—two wagons, 2. plows, 2. harrows, 3. cows & 3. stears & 2. heiffers, 6. sheep—a bed and bed clothes ~~6. sheep~~ for straw and the blacksmith tools—an apple mill—cutting box, wind mill—wagon a hand screw & wagon cloth liberty to saw his wood at the saw mill as much he wants ~~he keeping.~~ He is to grant a water right to the mill as far as it runs thro' his lands help to repair the saw 25. 28. 53. mill & race thereto in proportion as he shall make use thereof—the right to the saw mill to be during his life—likewise 25. acres of the woodland ~~joining~~ which I bought of Jam^s^ Simpson in Martick township.—and values the same to him at £2000.—to be paid in pay- per years out 333. 3. 4. 6. 0. 0. 0. ments of ~~£300. a year~~ £333. 6. 8. with interest—among the four daughters.

married to Henry Dietrich
married to Christian Rohrer
"Bequeaths to his 4. daughters, Elizab: Cath: Fronica, Margaretta, 200. acres of land more or less ∧ to be equally divided in my adjoin^g^ Jacob Fehl & Tobias In Conestogoe life time, or by 5. men to be appointed by the O. C^t^ with ~~£3~~ 4. fifth parts of the 28. acres woodland whereof the above 25. acres are a part.

Maria
"To ∧ the widow of my deceased son John he gives the possession of her children's part daring her widowhood & thereout she is to maintain them during their minority or so long as they live with her.

& along the r^d^ lead^g^ to Millers Town & adj^g^ the lands of Tobias
"~~The H~~ Eliz^a^ to have her share includ^g^ the saw mill ∧ —Cath-

[Rohrer v. Stehman.]

arine to her share joining big road lead^g ~~from Strasburg to the Indian Town~~ to the mill & adjoining the lands given to Tobias.

"To the widow (Cath^e) of the testator he gives the new stone ∧ dwelling house & 10. acres of land ∧, & the mill with 90. acres of l^d along the left side of ∧ road ~~leading~~ from the mill to the long lane & all the utensils ~~thereto~~ the mill dam &c. during her life—and also 2. front rooms in the present dwel^g house one above & one below on the left side—room in the cellar kitchen wash house & bake house & garret ∧ as much as she wants, a riding horse saddle & bridle ∧ 3. cows 6. sheep—all to be kept by Tobias—during he life time—a hind ∧ quarter of fat ∧ beef—2. fat hogs, apples as many as ~~much~~ she wants 6. barrels of cider, fire wood delivered to the house as much as she has use for, ready split for use in the stove & fire place in—10. bushels of potatoes—25lb: hackled flax, all the linen in the house & the ready hackled flax, household good & kitchen furniture as much she chooses—a house clock—& the linen and hackled flax.

"The mill & lands & house bequeathed to his widow after her death to go to the male heirs of ~~[illegible]~~ his son Tobias ∧ and & for want of male heirs it shall go to the males of John in fee—& to be valued by 5. men—~~subject nevertheless to a dower for his widow this~~ ~~[illegible]~~ in fee ~~[illegible]~~ if any he gets +

× "~~Tobias if he leaves a widow~~ ~~[illegible]~~ at a valuation to be fixed either by self hereafter ~~or~~ but if not done to be valued by 5. men & in parcels or or whole among them.

B. "That Tobias deliver 2. cords of good hick^y & oak ∧ wood, & my son-in-law's to deliver a cord of hick^y wood each to the house ready cut & split for a stove or fire place.

"The mill house and lands of 100. acres are to be ~~valued~~ parted & val^d ∧ ~~valued~~ after the death of the widow by 5. men &c. but if no g^d child^n it shall go to all my child^n & parted & appr^d among them.

"The ~~4~~ 2. unmarried girls when married ∧ to be furnished with ~~cattle~~ a horse & a mare saddle & bridle 10. head of cattle each ∧ 4. cows 3. stears 3. heifers—3. beds with &c. ∧ & other ∧ household goods in the same as those 2. which are ~~were~~ married got.

"Rohrers debt to be charged against him in part of his wife's leg^cy ∧ agreeable to his bond ~~—revoking all former wills made.~~

A "*Erors.* ~~Frederick Fehl~~ his son Tobias & Jacob Fehl & Frederick.

[Rohrer v. Stehman.]

"Wills made before to be revoked.

"Residue—amongst all 6. children.

"Quere, is nothing to be paid out of the lands given to John's children—No. £2000. to be divided among 4. daughters.

"Nov. 14, 1814.

"Note—the widow (of John dece'd) to have possession of the lands given to his 4. G$^{d}_{rs}$ children to keep possession of the lands youngest son is of age until $_{A}$ her death marriage or removal from it, and she must bring up & maintain them after which the appraisem$_{t}$ to take place.

"These are the notes referred to in my deposition taken in the Register's court June 6th 1815.

"JOHN HUBLEY."

The counsel for the plaintiff then, further to maintain the issue on their part, gave in evidence the record of a suit, *John Bachman et al.* v. *Tobias Stehman et al.*, to April term 1815, No. 713, in the court of common pleas of Lancaster county; and further examined *Frederick Fehl*, who testified as follows:

"*Tobias Stehman* has three sons; *Tobias Stehman* the son I mean; he was single when his father died; his mother survived his father six weeks. *Tobias* the father had two daughters married at the time of his death; he furnished them off well, as I heard, in cows, steers, bed and desks, riding horses and saddle; the oldest got that; *Rohrer's* wife did not get that, I think, but she might; Kitty got the same as *Betsey*, except horse and saddle.

"⋊ In the share of two hundred acres, the daughters were to have it to them, their heirs and assigns."

Joseph Hubley sworn, shown writing—"It is my father's hand writing; it is his signature; it was in the year 1814 or 1815, I think he was called on in June 1815 before that; I never knew him to go out but once; this handwriting is with different ink from the other; the date is my father's handwriting, but it is in different ink."

Jacob Fehl again—"500 dollars each one has in cattle and goods, and beds and one thing and another, and every sort of household furniture; I understand the single ones were to have 500 dollars like the other two—when John was married he got the same.

"⋊ I swore that each of the single daughters were to have 500 dollars or the worth of it; nothing said about horses and cattle; he said each were to get 500 dollars in money. He said he had given his married daughters 500 dollars worth, and his son *John*; the single daughters were to receive the same the others had—500 dollars; 500 were mentioned, whether in money or not, I don't know; they were each to have 500 dollars in furniture."

Henry Gall, plaintiff's witness, being under cross-examination by the defendants, testified as follows—(shown a paper purporting to be the last will and testament of *Tobias Stehman*, dated 16th November 1814, *prout* the same)—"This is my handwriting; *Tobias* declared

this to be his will; *Rathfon* is dead and *Rohrer* is also dead, he was of sound mind then; this is the paper that was not read to him."

The plaintiff, to maintain the issue on his part, then offered in evidence the record of an issue of *devisavit vel non* in the court of common pleas of Lancaster county to April term 1815, No. 713, in which *John Bachman*, &c. was plaintiff, and *Tobias Stehman* and others defendants. The counsel for the defendants objected to the admission of the said record in evidence: but after argument the court overruled their objection and admitted the same. To which opinion of the court the counsel for the defendant did then and there except and pray the court to seal this their bill of exceptions, which is done accordingly.

Plaintiff's points.

1. That no formality is required to make a legal will where the subject matter of the will is put in writing and proved by two witnesses so to be by the direction of the testator, and the same is done in his lifetime; and therefore it is not necessary the writing should be signed by the testator, nor that it should be sealed, nor that there should be any subscribing witnesses to it; and that such writing would be good without any of those matters and all of them.

2. That when a will contains several distinct devises and bequests, if any of them are found to be defective it will not defeat or in any way impair the others, which will remain good and lawful devises.

3. That minutes or notes fairly taken in writing for the purpose of drawing the will of the person, which is prevented from being drawn into form and signed by the testator and witnesses, by the death of testator, or any other accidental cause; if the said notes or minutes are proved to be taken down from the testator and in his presence and declared to be all right by the testator, the said notes or minutes will be a good will.

4. That if the jury believe the testimony of *Frederick Fehl*, *Jacob Fehl* and *John Hubley*, the minutes or notes taken from *Tobias Stehman* by *John Hubley* are sufficiently proved to be the same paper containing the minutes which is now before the jury.

Defendant's points.

1. That the authentication of the minutes taken by *John Hubley*, Esq. and alleged by the plaintiff to be the last will and testament of *Tobias Stehman* deceased, by the requisite number of persons, is a mere abstract question of law to be decided by the court. The jury are therefore bound by the opinion of the court as to whether there has been the requisite proof in this case to establish those minutes as the last will of the alleged testator.

2. In order to establish these minutes as the last will of *Tobias Stehman*, there must be proof by two witnesses that he knew their whole contents. In cases in which the testator has signed the instrument, and his signature is established by the testimony of two witnesses, such knowledge is presumed; but in this case, where the minutes were neither written nor signed by the testator, such knowledge must be clearly proved.

3. That the proof of the execution of these minutes must be made by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence, so that no link in it may depend upon the credibility of but one. Each of the two witnesses in this case must make proof so complete in itself that if the act of assembly were out of the question, the case would be well made out by the evidence of either.

4. That the two witnesses, to wit *John Hubley* and *Frederick Fehl*, who were present at the time when the instructions were given and the minutes were taken, must therefore correspond with each other as to every material particular, otherwise the minutes cannot be established; that therefore, as there is a variance between the minutes and the instructions as they are proved by *Frederick Fehl* in the following among other important particulars, these minutes cannot be established, to wit, by the minutes the mill, house and one hundred acres of land are devised to the widow of the alleged testator for life, remainder to the male heirs of his son *Tobias* in fee, and for want of such male heirs "it shall go to the males of *John* in fee," to be valued amongst them in parcels or in whole by five men after the death of his widow, but if no grandchildren, it shall go to all my children and be parted and appraised among them. By the testimony of *Frederick Fehl*, the instructions of the alleged testator were, that the premises, after the death of his widow, should go to his son *Tobias* if he gets boys, and if he don't get no boys, then to *Tobias* the eldest son of his son *John*, and if he should die before twenty-one, then to *Christian* the second son of his son *John*, and so on in succession; but whoever was to get the premises it should be appraised to him and the money divided into six shares among all his children and the children of his son *John* deceased. The testimony of *Jacob Fehl* corresponds with that of *Frederick*, except that *Jacob* expressly mentions what the law would have implied, that it should go to *Tobias Stehman* the son of the alleged testator if he gets a boy before his mother's death.

5. That as *John Hubley* has sworn, that there was a great deal of conversation at the time he took the minutes, and he "supposed he would be able to write the will from those explanatory observations and the minutes taken by him" and that it was understood both by him and the alleged testator, that these minutes were not to be considered as his will, but a mere memorandum from which he was to draw an instrument of writing, afterwards to be executed by the alleged testator as his will, and that the said minutes were merely intended to assist his recollection; the testimony of *John Hubley* is not sufficient, nor is he one sufficient witness, admitting all he has sworn to be true, to establish the minutes as a will.

6. That the identity of the minutes must be established by two witnesses each of whom will swear, that they are the same which were read to the alleged testator. That *Frederick Fehl* who never had the minutes in his hands till this trial—who could not read them

and who swears that there was no mark upon them by which he knew them, but still he thinks they are the same, is not a sufficient witness; that the deposition of *John Hubley* does not sufficiently establish their identity; and that proof that they were in the hands of *John Hubley*, and at the office of the magistrate when his deposition was taken, does not vary the case.

7. That a material variance in any particular between the instructions and the minutes, will destroy the whole of the minutes: that therefore if the the jury believe the testimony of *Frederick* and *Jacob Fehl* relative to the instructions given by the alleged testator concerning the mill, house and one hundred acres of land—their verdict should be rendered in favour of the defendant.

8. That the testimony given by *Tobias Stehman*, the plaintiff in this cause, is not sufficient in point of law to establish the minutes taken by *John Hubley* as the last will and testament of *Tobias Stehman* deceased.

Charge of the court.

This is an issue formed under the directions of the register's court, to ascertain by the verdict of a jury whether a certain paper containing minutes and notes taken by the late *John Hubley*, Esq. on the 14th of November 1814, of certain instructions then given to him by *Tobias Stehman*, which paper is alleged by the plaintiff to be the last will and testament of his father *Tobias Stehman*, be his last will and testament, or not.

It appears that *Tobias Stehman* being desirous of making a new will, different from one he had already made, sent for Mr *Hubley* and gave him instructions as to the manner in which he wished to dispose of his estate. Previously to Mr *Hubley's* arrival, Mr *Frederick Fehl* had taken some notes of his directions in German—Mr *Hubley* testifies that he did not make use of these notes—but he took down the instructions of Mr *Stehman*—and he says that when the instructions were written down they were read over to him—that Mr *Stehman* approved of the minutes made by Mr *Hubley*. Mr *Frederick Fehl* says they were read over to Mr *Stehman* and that he approved of them. The witnesses to these particulars and others which relate to the subject are *Jacob Fehl*, *Frederick Fehl* and *John Hubley*, Esq. You will pay particular attention to their evidence and the other testimony which has been offered, and give to all the testimony that weight to which you may think it entitled.

Mr *Hubley* took the minutes home with him; he prepared a will in due form for execution which was sent out to *Tobias Stehman*, who executed it without reading it or having it read to him, and it is testified that he was incapable of reading it. This will so executed has been declared invalid. And it is contended by the plaintiff in this case, that the instructions taken down by Mr *Hubley* constitute the last will and testament of *Tobias Stehman*.

The act of assembly respecting wills requires that all wills should

be in writing and be proved by at least two credible witnesses. Written declarations of a man's mind, as to the manner in which his estate shall go after his death, made *animo testandi*, that is with the intention of disposing by will, may amount to a will when duly proved. No formality is required to make a legal will where the subject matter of the will is put in writing, and proved by two witnesses to be by the direction of the testator, and the same is done in his life time; and therefore it is not necessary that the writing should be signed by the testator, nor that it should be sealed, nor that there should be any subscribing witness to it; such writing may be good without being accompanied by either of these particulars.

The law is, that where minutes or notes are fairly taken in writing for the purpose of drawing the will of a person, which is prevented from being drawn into form and signed by the testator and witnesses, by the death of the testator, or any accidental cause, and if these notes or minutes are proved by two witnesses to be taken down from the testator and in his presence and declared to be all right by the testator, they will constitute a good will.

And where a will contains several distinct devises and bequests, if any of them are found to be defective, it will not defeat or in any way impair the others, which will remain good and lawful devises.

We are asked by the defendant's counsel to instruct you that the anthentication of the minutes taken by Mr *Hubley*, by the requisite number of witnesses, is an abstract question of law to be decided by the court; that the jury are therefore bound by the opinion of the court as to whether there has been the requisite proof in this cause to establish those minutes, as the last will of the alleged testator.

There is no doubt that the authentication of a will by the requisite number of witnesses is matter of law for the determination of the court; and therefore where a will is drawn up and signed by the testator, and witnesses are called in to attest it, it is for the court to determine whether it is authenticated by the requisite number of witnesses.

But in order to establish these minutes as the last will of *Tobias Stehman*, there must be proof by two witnesses that he knew their whole contents. In cases in which the testator has signed the instrument, and his signature is established by the testimony of two witnesses, such knowledge is presumed; but in a case of this kind, where the minutes were neither written nor signed by the testator, such knowledge must be clearly proved. And you are the judges to determine whether it has been so proved or not.

The supreme court have decided that the execution of a will must be proved by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence so that no link in it may depend upon the credibility of but one. Therefore to establish the minutes in this case, each of the two witnesses called to establish them must make proof complete in itself, so that if the

act of assembly were out of the question the case would be well made out by the evidence of either.

The two witnesses who were present at the time when the instructions were given and the minutes were taken must correspond with each other, as to every material particular—and therefore a material variance between the minutes and the instructions will prevent the minutes from being established.

So if Mr *Hubley*, depending upon his memory and supposing he would be able to write the will from his recollection of what was said by the testator, has omitted any matters which the testator intended to insert in his will, the minutes cannot be established as his will.

The jury are the judges of the credibility of the witnesses and of the meaning to be attached to the expressions used by them in the course of their testimony. The identity of the minutes must be established by two witnesses, and whether it has been established by Mr *Hubley* and Mr *Frederick Fehl* is for you to determine.

We are asked to say that if the jury believe the testimony of *Frederick Fehl*, *Jacob Fehl* and *John Hubley*, that the minutes or notes taken from *Tobias Stehman* by Mr *Hubley* are sufficiently proven to be the same papers containing the minutes which is now before the jury. Supposing all they say to be true as they have expressed it, the effect of what they have said is to be determined by the jury and they must judge, under all the evidence which has been adduced, whether the identity has been legally proved.

Errors assigned.

1. The court erred in admitting the defendant in error to give in evidence the minutes taken by *John Hubley*, Esq. on the 14th of November 1814 *prout* the same; to which opinion of the court the first bill of exceptions was taken.

2. The court erred in admitting the record of an issue of *devisavit vel non* in the court of common pleas of Lancaster county to April term 1815, No. 713, and the *caveat* and proceedings of the register's court; to which opinion of the court the second bill of execptions was taken.

3. The court erred in not fully answering the *first* point of the plaintiff in error; and so far as it is answered, it is error.

4. The court erred in their answer to the *second* point of the plaintiff in error in the following words: "and you are the judges to determine whether it has been so proved or not."

5. The court erred in not having given a full answer to the *fourth* point of the plaintiff in error, and so far as they have answered it, there is error in their answer.

6. The court erred in not fully answering the *fifth* point of the plaintiff in error, and so far as they have answered it, there is error in their answer.

7. The court erred in not having fully answered the *sixth* point of

the plaintiff in error, and so far as it is answered there is error in their answer.

8. The court erred in not fully answering the *seventh* point of the plaintiff in error, and so far as answered there is error in their answer.

9. The court erred in not fully answering the *eighth* point of the plaintiff in error, and so far as answered there is error in their answer.

10. The court erred in stating that "the law is that where minutes or notes are taken in writing for the purpose of drawing the will of a person, which is prevented from being drawn into form and signed by the testator and witnesses by the death of the testator or any other accidental cause, and if these notes or minutes are proved by two witnesses, to be taken down from the testator and in his presence and declared to be all right by the testator, they will constitute a good will."

11. The court erred in stating that "where a will contains several distinct devises and bequests, if any of them are found to be defective, it will not defeat or in any way impair the others, which will remain good and lawful devises."

12. The court erred in the last paragraph of their charge, which states, "we are asked to say that if the jury believe the testimony of *Frederick Fehl*, *Jacob Fehl* and *John Hubley*, that the minutes or notes taken from *Tobias Stehman* by Mr *Hubley* are sufficiently proven to be the same papers containing the minutes which is now before the jury. Supposing all they say to be true as they have expressed it, the effect of what they have said is to be determined by the jury, and they must judge under all the evidence which has been adduced, whether the identity has been legally proved."

Rogers, for plaintiff in error.

Under the act of 1705, there are two essential requisites to a will. 1. That it should be in writing. 2. That it should be proved by two witnesses. The question of the authentication of an instrument is a matter of law for the decision of the court. 6 *Serg. & Rawle* 489. Was *John Hubley* such a witness as contemplated in the case in 3 *Yeates* 511? These notes were taken as mere memoranda to refresh the memory of *John Hubley*, and there were explanatory observations which were never read to *Tobias Stehman*. *John Hubley* is an insufficient witness, and even if he is sufficient, the other two do not amount to another witness. 6 *Serg. & Rawle* 47. Every thing contained in *Hubley's* notes is in direct opposition with what is contained in the testimony of *Frederick Fehl* and *Jacob Fehl*, and therefore, there is no connection between the witnesses in support of the will, and no one would be sufficient with respect to all the bequests.

There are in fact two wills, one of *John Hubley*, the other of *Frederick Fehl*, each of which is contrary to the other. 16 *Serg. & Rawle* 82. The act of 1705 prescribes no particular form of

will; yet in Pennsylvania every loose scrap of paper, even if proved by two witnesses, would be a sufficient will. Every scrap of paper made in contemplation of death, is not to be received as a will. *Burnet's Appeal*, opinion delivered by Chief Justice *Gibson*, at Philadelphia. These notes were never intended as a will, but mere instructions and memoranda to assist in drawing the will.

A will is a whole and cannot be divisible; the distinction is, what is matter of construction, and what is matter of positive enactment.

Frazer, for defendant in error.

As the identity of the paper was disputed, it became a matter of fact to be submitted to the jury; and the paper itself was proper subject matter for the consideration of the jury, on this question of identity. If the identity of the paper had not been denied, the court below would not have left it to the jury. Mr *Fehl* having heard the minutes read by Mr *Hubley* to *Tobias*, and Mr *Stehman* having made no objection to the correctness of these minutes, is one good and sufficient witness to establish the validity of the will. Mr *Hubley*, the person who drew the minutes, read them to *T. Stehman*, and having corrected and made the alterations directed by *Stehman*, and having afterwards read the minutes as corrected to *Stehman*, without any objection from him, makes *John Hubley* a second complete witness. An ambiguity appearing on the face of the will, is not sufficient to invalidate it, and is not a question on the issue of *devisavit vel non*. 6 *Serg. & Rawle* 56. The fact of execution and the sanity of the testator, are matters of fact for the determination of the jury; the legality of execution is a matter of law for the court. 1 *Smith* 40; *Patterson* v. *Patterson*, 6 *Serg. & Rawle* 53; 3 *Yeates* 511; 6 *Serg. & Rawle* 454, 494; 16 *Serg. & Rawle* 82; 1 *Serg. & Rawle* 263; 6 *Serg. & Rawle* 47; 19 *Johns.* 386; 1 *Pick.* 453; *Powell on Dev.* 457.

J. Hopkins, for defendant in error.

The decisions have been the same under the acts of assembly and the statutes of *Henry* 8, with the exception of the proof by two witnesses. 6 *Serg. & Rawle* 455. At the time of the concoction of such an instrument, there would be a great deal of conversation, and the testator would necessarily say many things, which afterwards he might think better of, upon the consequences being explained, and would after direct a different disposition of what he first mentioned, but after the instrument had been read to him, and he approved of it, every thing which had been said (except in cases of fraud and imposition) contrary to the instrument became of no effect, and *F. Fehl* had heard *T. Stehman* approve of the minutes, make *Frederick Fehl* one complete witness. Mr *Hubley* has testified that he drew the instrument, and that after he drew it, he read it twice to him deliberately, and that it was written to the entire satisfaction of Mr *Stehman;* and he constitutes a second witness. No informal will could ever be supported, if the light conversations made

previous to the execution of it could have the effect to contradict it. This was a blended case of fact and law, depending upon written and parol evidence; and the fact and law being so intimately connected, the court were bound to leave the question to the jury, to ascertain what is the proper character of the paper. 1 *Serg. & Rawle* 176, 516; 4 *Serg. & Rawle* 279; 7 *Serg. & Rawle* 372; 1 *Penns. Rep.* 386. This was a question of law purely for the consideration of the jury, and had the charge been that they were or were not fully proved, it would have been error.

The court could not charge the jury as requested, because it would impugn the question trying; there is an entirety and unity in the sentiments of Mr *Hubley* and *Fehl*.

When there are distinct and separate devises unconnected with the other parts of the will which are void, these separate devises would be valid. *Powell on Dev.* 29; 3 *Rep.* 31; 6 *Serg. & Rawle* 455.

Buchanan, in reply.

Is the authentication of a will matter of fact to be determined by a jury, or a question of law to be determined by the court? If it be a question of fact, the statute of frauds is entirely useless. If you refer it to a jury to determine the matter, a jury will always determine in favour of the authenticity of a will if there be one credible witness. In this case, it is a sheer question of law; and the question was, Supposing all the testimony in this case to be true, is the execution of this instrument sufficiently proved. *Hock* v. *Hock*, 6 *S. & R.* 47. The law has determined, that two witnesses are necessary for the proof of the execution of a will, and if the matter were submitted to a jury one witness would in all cases substantiate the will. The question of the legality of the execution is a matter of law to be determined by the court, and not a question of fact; 6 *S. & R.* 495; 16 *Serg. & Rawle* 86; although the question whether this is a sufficient testamentary disposition of the property of *Tobias Stehman*, is not, perhaps, properly before the court, yet I will discuss the question as if raised; and the first question will be, are there two good and sufficient witnesses? there is not even one complete witness. The testimony of *Frederick Fehl* is in direct opposition to the evidence of *John Hubley*, with respect to a number of dispositions of the property. One set of instructions has been proved by Mr *Fehl*, and another set of instructions has been proved by Mr *Hubley*. Mr *Hubley* does not constitute one complete witness; for he says, that these notes do not contain the whole of the instructions given to him by *Tobias Stehman*. *John Hubley* was a witness to support the regular will, but could not be a witness to substantiate these notes; and being a witness to the former will, would be in direct opposition to these minutes.

Powell on Dev. 29. The court will not consider themselves bound by the decision under the statutes of *Hen.* 8; under which all loose

papers were held to be good. Is it right that when there are two complete witnesses to the disposition of one particular, and the witnesses differ in respect to the rest, that the devise on which they concur should be carried into effect, and that the testator would die intestate as respects the other property?

The opinion of the Court was delivered by

Huston, J.—In the infancy of the province of Pennsylvania, when wealth was not common, and the distinction between real and personal estate, as to liability for debts, had been abolished, an act of assembly was passed concerning probates of written and nuncupative wills, and for confirming devises of lands. This act of 1705 differed widely from that which our ancestors had left in force in England, both as to the substantial and formal requisites of a valid will of lands. The construction put on it, soon after its enactment, handed down by tradition, is first found in *Dallas's Reports*, in a written and permanent form; but that decision was made by judges who had been lawyers as early as 1750, and who in their youth must have been acquainted with others who had practised in 1730, or even 1720. Some have in our day questioned the correctness of the construction early given to this law; but as it has been acted upon to the present day, and as it has been decided that a trial and decision expressly on the validity of a will does not preclude heirs or devisees from again contesting the matter in ejectment for lands, that construction has become a rule of property, and if we should now change it, we should give occasion to many suits and destroy many titles (now held good) in the hands of heirs and purchasers. The legislature have at present before them a bill on the subject; until some provision by them, we are bound by many considerations to adhere to what has been decided, even though some of those decisions have gone further than we could wish. "All wills in writing, wherein or whereby lands, tenements or hereditaments within this province have been or shall be devised, being proved by two or more credible witnesses, upon their solemn oath, *or by other legal proof*, in this province," &c. The case of *Slight* v. *Wilson*, 1 *Dall.* 94, has remained unshaken; it settles: first, that it is not necessary that a will devising real estate in Pennsylvania, should be sealed; second, nor that all the subscribing witnesses should prove the execution; third, nor that the proof of the will should be made by those who subscribed as witnesses; fourth, nor that the will should be subscribed by witnesses. See also 2 *Binn.* 414. I shall not cite all the cases in our books. *Lessee of Eyster and others* v. *Young*, 3 *Yeates* 511, is nearly this case. There Mr *Rudisill* took drawn notes from the mouth of the testator, of the disposition of his property, intending to draw a formal will; two persons were in the room and heard them dictated; they heard them read over to testator and approved. Mr *Rudisill* drew them into a formal will more copiously and fully, and containing some clauses which Mr *Rudisill* had trusted to his memory. The

identity of the paper was contested, and not more fully proved, not so fully as in this case. The notes were established as the will by a verdict in conformity to the charge of the court. That case, and *Arndt* v. *Arndt*, 1 *Serg. & Rawle* 256, fully establish, that memoranda written by another, and proved by two witnesses to have been approved by the testator or written by the testator himself, though not put into a formal will and not signed, being proved by two witnesses to be the testator's handwriting, may be a good will.

In the present case, *Frederick Fehl* and *John Hubley* fully prove the memoranda to have been dictated by the testator, and to have been read over to him and explained by Mr *Hubley*, and in some parts corrected at this reading; and then to have been declared to be all right by the testator. It was read a second time after these corrections had been made, and these explanations given, and declared to be all right. This paper was taken home by *Hubley* to draw a formal will, and one was drawn, but executed by the testator without being read to him, and for that reason rejected from probate.

Jacob Fehl corroborates these witnesses; he was present while part of the directions were given, but went away; the next day the testator told him *Hubley* was drawing the will; and again told the witness to bring it out from *Hubley* to him, and the witness did so. It was executed without being read, because all these were Germans, and could not read English.

The identity of the paper was as fully proved as is generally possible; and that was left to the jury, together with the credibility of the witnesses.

But the counsel for the opponents of this paper as a will, taxed the memory of *Frederick* and *Jacob Fehl*, and supposed the account they gave of the several bequests differed in some of the details from the written memoranda, and drew an argument against its validity from this. Now if a formal will is read in the presence of the witnesses, before its execution, and they in court prove the sanity of the testator and see the execution of the will, and then on being asked as to its contents, differ a little or a good deal, or if after the lapse of fifteen years, as in this case, this want of recollection or inaccurate recollection would at all affect the validity of the will, or the bequest contained in it, we had better cease to write wills. So in this case, after the proof given, that it was dictated by the testator, read over and explanations made and corrections, and then read again and all approved, it is beyond being impugned by the failure of minute recollection of witnesses as to its minute details. The witnesses prove distinctly, that every possible pains were taken to have these minutes correct; they were written item by item as dictated; read over item by item, explained and approved; and then all read together, and all approved. That those who did this, or who were present when this was done, do not recollect, after fifteen years, all that was then written, or do not recollect it exactly as written is natural; is what must always happen; and is one main reason why wills must be in wri-

ting. It is possible to destroy the force of written memoranda, by proving them to have been unfairly taken down, or falsely read. In the same manner a will or deed may be impugned. It was not openly, nor I think covertly, suggested, that *John Hubley* was guilty of any thing like this. It was not put to the witnesses to say positively, that any thing was in these minutes which the testator did not direct; nor to say, that the witness was sure he directed any thing which is not to be found there. They stated the directions according to their recollection; but no one of them was asked to point out a material variance, nor to say, that his recollection of any particular was so perfect that he would himself rely on his own recollection in contradiction to the minutes.

There were two bills of exceptions to the admission of testimony; neither of which was much insisted on here.

The first is, that the memorandum or minutes taken down by Mr *Hubley* should not be read to the jury—now I should like to know how the jury could have decided one of defendant's points, viz. whether the parol proof of instructions, and the minutes agreed or differed, unless the minutes had been read; but I pass this. Wherever two witnesses prove a paper as a will, such paper always has gone, and always must go to the jury, who are to decide whether, on the whole proof, it is the will of testator or not.

The next bill of exceptions is still less tenable. After the plaintiffs had gone through their testimony, the defendants produced the paper drawn by *John Hubley* as a formal will, and which had not been read by or to the testator; but which the testator had executed in the presence of two persons, who had subscribed it as witnesses; and the defendant called those witnesses and proved the execution of it by them; this, evidently, with the intention of arguing to the jury, that this latter paper was the true will.

That paper had, however, been offered for probate, by the same persons who now offered the minutes as the will, and on a trial of a feigned issue in the same court, before the same judges, it had been decided that the paper now offered by the defendants as the will, was not the last will of *Tobias Stehman;* and the plaintiffs offered and read the record of such trial and decision. In fact, the defendant's counsel ought not to have offered as the will that condemned paper; if objected to, the court ought to have rejected it; when it had been read, the shortest way of disposing of it was, to show the record which had disposed of it.

Points were proposed as matters of law, on which the court was requested to instruct the jury. Some of these are not in the most perspicuous form; some are immaterial; some suggest matters not material in this cause. The charge of the court was an answer to all that was material in this case, and in it there was no error against the party complaining; if any thing was at all wrong, it was in their favour.

Judgment affirmed.

Stehman and others *against* Stehman.

A, after devising a tract of land to the children of his son *John* who was dead, and another to his son *Tobias;* devised one hundred acres to his widow for life, and *after* her death "to the male heirs of *Tobias*, if any he gets, in fee," and "for want of male heirs of *Tobias*, to go to the male heirs of his son *John* in fee;" "the said one hundred acres to be parted and valued *after* the death of the widow, by five men;" but if no grandchildren, to go to the devisor's children and be divided among them. At the death of the widow, *Tobias* was single and without children, but afterwards married and had children. Held, that the limitations over after the death of the widow were concurrent contingent remainders, and for want of male heirs of *Tobias* at her death, vested irrevocably in the male heirs of *John*.

A limitation is not to be deemed an executory devise if it may by any practicable construction be sustained as a contingent remainder.

No presumption of an intent to die intestate as to any part of the estate, is to be made, where the words of the testator will carry the whole.

APPEAL from the circuit court of *Lancaster* county, held by Chief Justice *Gibson*.

This was an action of ejectment brought by *Tobias Stehman*, *Christian Stehman*, *John Stehman*, and *Jacob Stehman* against *Tobias Stehman*, in which judgment was given for the plaintiffs upon a special verdict.

Tobias Stehman, the grandfather of the plaintiffs and father of the defendant, being seised in fee of several tracts or parcels of land, by his will dated the 14th of November 1814, (said will being contained in the memoranda of a scrivener, who was to put the same into form) made, among others, the following devises. "To *Tobias*, *Christian*, *John* and *Jacob*, the children of my son *John Stehman*, (the plaintiffs) my plantation bought of *Daniel Brenneman* containing one hundred and thirty-three acres to hold to them in fee, to be valued and appraised by five men *after* the death, marriage or removal of *John's* widow. To *Tobias Stehman* my son, (the defendant) the mansion house and place adjoining *Bare* and others, containing about two hundred acres more or less in fee. *Tobias* to grant a water right to the mill as far as it runs through his lands and pay certain legacies. To my four daughters, two hundred acres of land to be equally divided among them. The testator next devises the property in dispute as follows. "To my widow Catharine, I give the new stone dwelling house and ten acres of land, and the mill and ninety acres of land along the left side of the road from the mill to the big lane, all the utensils, the mill dam, &c. during her life. The mill, lands and house bequeathed to my widow *after* her death to go to the male heirs of my son *Tobias* in fee, if any he gets, and for want of male heirs it shall go to the males of *John* in fee, and to be valued by five men at a valuation to be fixed either by self hereafter, but if not done to be valued by five men, in parcels, or whole, among them. The

mill, houses, and lands of one hundred acres, are to be parted and valued *after* the death of the widow, by five men, &c. but if no grandchildren, it shall go to all my children and parted and appraised among them." He further devised that *John's* widow should keep possession of the one hundred and thirty-three acres of land bequeathed to her children, until her death, marriage or removal from it, and thereon bring up and maintain them. The special verdict which refers to the foregoing will, and contains the facts already stated, further sets forth, that the said testator, at the making of the said will, had a wife named *Catharine*, *Tobias*, the defendant, his son, and four daughters, *Catharine* married to *Christian Rohrer*, *Elizabeth* married to *Henry Dietrich*, *Margaret* married to *Daniel Dietrich*, and *Feronica Stehman*. That the testator's son *John* was born on the 25th of December 1783, and died on the 25th of September 1813, leaving a widow, who married *Michor Brenneman* in 1816, and four sons the plaintiffs in this cause. That the said *John Stehman* deceased lived upon, worked and enjoyed the tract of land devised by said will to his widow, from his marriage on the day of 1805, until his death; and his widow and children lived on and enjoyed it till the making of his father's will.

That the said *John Stehman*, the son, occupied and enjoyed the two hundred acres devised by said will to his sisters, from his marriage in 1805 until his death. That the widow of the testator died the 4th of January 1815, when *Tobias* the son was single and had never been married.

That *Tobias* the son intermarried with his present wife the 15th of June 1815, by whom he has three sons and one daughter, namely *Tobias*, born the 4th of July 1817; *Henry*, born the 10th of May 1822; *Jacob*, born the 18th of August 1825; and *Martha*, born the 26th of June 1819.

That *Tobias Stehman*, the son, was born the 24th of October 1785, and lived with his father until his father's death; and was a dutiful, active and industrious son, aiding and assisting his father in carrying on his farms and in building the mansion house, mill and dam erected on the lands in dispute, which buildings were begun in the year 1808, and completed in 1809 or 1810. That *John*, the son, when they were pressed in the hauling for the building, helped as other neighbours with his team a few days.

If the court should be of opinion that, on the true construction of the said will, connected with the facts and circumstances above found, the plaintiffs are by law entitled to recover the mansion house, mill and lands for which this ejectment is brought, then judgment to be entered for the plaintiffs with six cents damages and six cents costs; but if the court should be of opinion that, upon a true construction of the said will, connected with the above facts and circumstances, the plaintiffs are not entitled to recover, then judgment for the defendant with six cents costs.

Frazer, for plaintiff in error, contended, that as *John* was dead before the testator made his will, a fair construction of the instrument would give the lands devised to the male heir *Tobias*, the limitation being "to the male heirs of *Tobias* in fee, if any he gets." The circumstances of the family and the equality among the grandchildren thus produced, tend to fortify this construction. In 1805 when *John* was married, the testator owned six hundred and thirty-three acres of land, from which time for eight years and a half *John* was in possession of the two hundred acres devised by the will to his sisters, and for nine years and two months he and his family occupied an additional tract of one hundred and thirty-three acres. These were advantages that *John* and his children enjoyed over the other devisees when the will was made. *Tobias*, who was of age in 1806, worked for his father both before and after that period, till the death of the latter, without compensation. The rents, issues and profits of the three hundred and thirty-three acres received by *John* for eight or nine years, and the loss of *Tobias* in working for his father after 1806, were the causes of the testator's devising two hundred acres to him. This devise to *Tobias* should, therefore, be thrown out of view, and it should be considered that *John's* children have received one hundred and thirty-three acres of land under the will, whilst the children of *Tobias* will receive but one hundred by the construction we contend for. Mr *Frazer* here went into a calculation to show that the proceeds of the land received by *John*, with the devise to his children, placed him and them in a better situation than *Tobias* and his children. He further contended, that the testator never contemplated limiting the time of *Tobias's* having children to the death of the widow, who was a very old woman, and lived but six weeks after her husband; more especially, as *Tobias* was unmarried when the will was made. The language of the will is, *after* her death; it is not said if *Tobias* have no male heirs *at* her death, or *when* she dies. It was a life estate to the widow, with an executory devise over upon a condition, which might be performed at any time during the life of *Tobias;* and until his death, or the birth of a male heir, the fee was in abeyance. A limitation over after a freehold estate that is not concurrent with the freehold estate, such limitation will take effect as an executory devise, if it be within a time that does not produce a perpetuity; 2 *Fearne on Dev.* (by *Powell*) 21. Here a freehold estate has been created, but the limitation over is to go upon the contingency of having male heirs; the fee, therefore, would rest in the heirs at law until the happening of the contingency—the birth of children of *Tobias*. The first taker has only the use of the estate, pending the contingency mentioned, which must happen within the time limited. 4 *Kent's Com.* 264, 265. When no person *in esse* in whom the fee can vest, it is in abeyance. 2 *Tucker's Black.* 107. Where a future estate is devised upon a contingency, until that contingency happen, the fee simple descends to the heir at law. *Ibid.*

[Stehman and others v. Stehman.]

173. As to the construction of the will, he cited, 3 *Com. Dig.* 448, *N.* 16, *tit. Devise*; 7 *Bac. Ab.* 341, *F. tit. Will.*

Rogers, for defendant in error.

A remainder is a remnant of an estate in lands or tenements, expectant in a particular estate, and created at the same time with it. Remainders are vested or contingent. *Fearne* says, there are four kinds of *contingent* remainders. *Fearne* 3, 4, 5, 6, 7. More properly reducible to two kinds—to an *uncertain person*, and upon an *uncertain event*: they are so treated by *Blackstone*, and adopted by Chancellor *Kent*. 4 *Kent's Com.* The definition of an *executory devise* by *Blackstone* is incorrect, it is that of a contingent remainder. See *Fearne's* definition. 2 *Fearne* 1, 2, 3, (298), (299). It follows, if the same estate that is created by devise could be created by deed or common law conveyance, it is not an executory devise, but a contingent remainder. The great difference between the two is, that a contingent remainder can be barred by a fine levied, or common recovery suffered by the tenant for life. An estate limited on any event cannot take effect as an executory devise when there is a particular estate of freehold capable of supporting it; it is a contingent remainder. 2 *Fearne* 3, (299), *et seq.* And again, in same book 496 (418), whenever a contingent limitation is preceded by a *freehold* capable of supporting it, it is construed a contingent remainder, and not an executory devise. In *Purefoy* v. *Rogers*, Lord *Hale* says, where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. 2 *Saunders* 381 to 388, *note* 9. The same principle is recognized in *Doe* v. *Morgan*, 3 *Term Rep.* 765; *Goodtitle* v. *Billington*, 2 *Doug.* 758; and by Chief Justice *Tilghman* in *Dunwoodie* v. *Reed*, 3 *Serg. & Rawle* 441. It follows, that where a life estate is created in one person, and a limitation over, or a contingency to another, the contingent limitation is not an executory devise, but a contingent remainder; and the rule holds good in *all cases* when the estate for life goes into operation. Events that take place *previous* to the death of the testator (as the death of the tenant of the particular estate) may alter a contingent remainder into an executory devise. This is from the necessity of the case, otherwise the devise would fail altogether; *ut res magis valeat quam pereat.* 2 *Fearne* 494, 495, 496, (418), (419). But events happening *subsequent* to the death of the devisor cannot have this effect, and therefore held, that "where a freehold has once *vested*, it seems no subsequent accident will make a contingent remainder enure as an executory devise." 2 *Fearne* 498, (420), (421); 1 *Roberts on Wills* 478, and cases there referred to; *Doe* v. *Morgan*, 3 *Term Rep.* 766; *Carlyle* v. *Carman*, 3 *Rawle* 491. In this case, had the widow died before the testator, the contingent remainder would have been changed into an executory devise, and then *Tobias's* sons would have taken the estate; but the freehold *vested* in the widow, and the limitation over was a contingent

remainder. On the death of the widow, 4th January 1815, *Tobias* had no male heirs, and as the remainder could not vest it was gone, and the devise over to *John's* sons took effect. When was the fee simple to pass? *At the death of the widow.* This appears fully from the will. Clearly the testator contemplated a state of the parties at the death of the widow, not at *Tobias's* death. The estate was ordered to be parted and divided at the death of the widow, among the grandchildren, if they were alive at the time; if dead, then among the heirs at law. Yet, according to the argument urged, if there had been no grandchildren at the widow's death, the estate could not be parted among the heirs at law, but must remain in abeyance, until after possibility of issue extinct of *Tobias.* The fee was intended at the death of the widow to vest in some one, in *Tobias's* sons if he had any, if not, in *John's* sons. These limitations then are contingent remainders in fee, depending on an uncertain event. The words used, "heirs male," *are words of purchase*, descriptive of the parties to take. No estate was created in *Tobias;* of course the sons would take nothing by descent. The rule in *Shelly's* case is, therefore, inapplicable. See *Archer's Case*, 2 *Coke's Rep.* 66; 1 *Rob. on Wills* 466, note. It is a *special description* of the devisees, and comes within *Dunwoodie* v. *Reed*, 3 *Serg. & Rawle* 451. It is contended that there is an estate tail male in *Tobias* by implication. Estates by implication arise in two ways. 1. By express words when there is a devise to the party: as an estate to A and his heirs, but if he die without issue of his body then to B, is an estate tail by *implication* in A. 2. By force of implication without express words of devise to the party himself, upon the principle of giving effect to the *intention* of the testator. Here no necessity for implication, because *John's* sons could have taken at the death of the widow, and no implication can arise in violation of the testator's intention. The devises over were contingencies with a double aspect. The case of *Loddington* v. *Keim*, 1 *Salk.* 224; *Ld. Raym.* 203. They are contemporary remainders, not expectant one after another; the limitations depend upon the event of the birth of a son by *Tobias* during the life of the widow. They are not dependent contingent remainders and to take effect in *succession*, but merely the substitution of one contingent remainder for another. 18 *Vin. Ab.* 402, *title Remainder.* 2 *Doug.* 505, *note;* 4 *Kent* 200, 201; 2 *Doug.* 758; 1 *Doug.* 264; *Goodwright* v. *Dunbar*, 2 *Black. Rep.* 777; *Doe* v. *Holme*, 3 *Serg. & Rawle* 451, 452. The distinction between a fee to succeed a fee and a collateral fee is, whether the first estate vests or not. If it does, the second estate is *void*, because there can be no limitation after a prior vested fee simple; but if the first estate never vests, and it cannot take effect at the time when it ought to vest by the happening of the contingency, the second estate takes its place and vests when the first limitation should have vested. 4 *Kent's Com.* 200, 201; 3 *Serg. & Rawle* 441. The estate in fee, therefore, becoming

vested in *John's* sons, all other limitations were void. 2 *Fearne* 420 to 440.

Jenkins, on same side.

It is better that the law should be fixed and certain, than that it should be made to bend to cases of supposed hardship. This is a plain case of two concurrent contingent remainders in fee, and is more so than the case of *Dunwoodie* v. *Reed*, where the court decided the remainders to be contingent and good. The male heirs of *Tobias* take by purchase and not by descent—they are described; besides which the testator recognized *Tobias* as living, which in the case just referred to was held to make a distinction. It is evident the testator did not intend *Tobias* to take any estate. Whenever a devise is made to the "male heirs" of a person who is living, such words are words of description, and the male heirs take by purchase and not by descent; 4 *Kent's Com.* 220. No estate by implication can arise, for there is a freehold to support the remainder. *Tobias* was amply provided for by the devisor in his will, who, as if to make it clear that *Tobias* should have no estate in the land in dispute, required him to convey a water right to the mill which forms a part of the property covered by the devise to widow and his "heirs male" or for want of them *John's*. It is an axiom that where there is a particular estate the limitation over is never an executory devise, but a contingent remainder; 1 *Fearne* 401, 550, 554; with this single exception, where the devisee of the particular estate dies in the lifetime of the testator. Were the intention of the devisor in conflict with this rule it could not prevail, but it is manifestly in accordance with it; 2 *Saunders* 388, A, G; 2 *Fearne* 10 (495); 3 *Rawle*. Here the particular estate had vested in the widow; the limitations over were consequently contingent remainders, and must vest at the determination of the particular estate or never vest at all. *Tobias* having no "male heirs" at the widow's death the remainder as to them was gone. A remainder to B's eldest son then unborn, after the determination of A's life estate, is absolutely gone if A die before B has a son; 2 *Bl. Com.* 169. So strict is this rule, that if the child were *in ventre sa mere*, and born after the determination of the particular estate, the remainder could not vest. *Tobias* having no male heirs, the remainder vested in the sons of *John*. Two or more concurrent remainders in fee simple may be limited over, though one only can take effect, so that when the male heirs of *Tobias* have failed, those of *John* are substituted; 2 *W. Black. Rep.* 777; *Douglass* 753; *Dunwoodie* v. *Reed*, 3 *Serg. & Rawle* 438. The difficulty in this last case was, whether the first remainder was vested or contingent; here there is no doubt it is contingent. It is apparent then that the limitation over to *Tobias's* children is a contingent remainder and not an executory devise, and that it fell through for want of male heirs at the death of the widow, upon the plain rule that a remainder must vest at the determination of the

particular estate or *eo instanti* it determines. The remainder to *John's* children is also contingent, and rested on the chance of a failure of "male heirs" of *Tobias*. If there were none at the death of the widow, then this second was substituted for the first remainder, as effectually as if the testator had said in so many words there should be a substitution. The estate therefore goes to *John's* children, and that too in accordance with the intention of the testator, which was that the grandchildren living at the widow's death should take; but if there were no grandchildren living at that time then it was to go to the testator's own children.

Hopkins, in reply.

Every will is to be construed according to the intentions of the testator, and if that be apparent, courts will carry it into effect, if not contrary to the rules of law. It is certain a preference is given by the will to the male heirs of *Tobias* over the male heirs of *John;* these latter could not take until *Tobias's* heirs were extinct, and then, and not till then, was the estate to go over. We say not till then, for it is manifest that the limitation to the "male heirs of *Tobias, if any he gets,*" is not confined in point of time to the death of the widow, but is coextensive with the life of *Tobias*, and a son born ten years after is as fair a subject of the testator's bounty as one born before the widow's death. The devisor could not have intended to limit the time to the life of his widow who was an old woman. The condition attached required time for its performance; and the life of the son, not the death of the widow was its limit. To say that *Tobias's* children shall not take, would be contrary to the intention expressed. If *Tobias* had had sons before and after the death of the widow, all would have come in equally, although the estate in the first instance vested in those living at the widow's death. The whole issue male of *Tobias* is meant, and the devise would be open to let in each subsequent son born after the remainder vested. After the death of the widow, and until *Tobias* had male issue, there would be an intestacy; after their birth they would take the estate as the chief objects of the testator's bounty. This may be done by an executory devise if within a time to avoid a perpetuity. *Fearne* 21. The limitation, "after the death of the widow, to the male issue of *Tobias*, if any he gets," is an executory devise. The ulterior limitation has no connexion with the point of time when the particular estate determines, which is manifest from the condition, that *John's* children are not to take but for *want* of *male heirs* of *Tobias*. It amounts to this; an estate to the widow for life, and if, after her death, *Tobias* should have any children, the estate in fee simple to go to them, but in default of male issue on his part, *then* to *John's* children. The limitation to the children of *John* is void, being an attempt to limit a fee, upon a fee which cannot be done. No remainder can be limited after a grant in fee simple. 2 *Black. Com.* 164; *Fearne* 8; *Coke Lit.* 18 *a*. A contingent fee absorbs the estate as much as a vested

fee, because it runs to perpetuity. *Coke Lit.* 18 *a.* The words of the will are not *at* the death, but *after* the death of the widow; it directs the parting of the mill, houses, &c. *after* that event. To carry into effect the general intention of the testator, this may be construed to be an estate in tail male to *Tobias.* He was the stock from whom the whole would pass; it is to go to all his heirs male; and he may fairly be said to have an estate tail by implication. The expression "male heirs" brings them within the letter of the statute *de donis*, and they fall under the rule in *Shelly's* case; they are heirs and not purchasers. In *Robinson* v. *Robinson*, 1 *Burrowes* 38, to effectuate the general intention of the testator, an estate tail was implied against the express words of the will. Here an implication may be made without interference with express words, *Tobias* being the stock from whom the male heirs are to issue. *Pebis* v. *Mitford*, 1 *Ventris* 372, is the case of an estate by implication. It is done to save the estate and carry into effect the intention of the party, and courts are *astute* for these purposes. *King* v. *Milling*, 1 *Ventris* 225. The last son of *Tobias* being as much an object of the testator's bounty as the first, the remainder by implication vests in *Tobias.* 2 *Levinz* 58; *Lessee of Haines* v. *Witmer*, 2 *Yeates* 401. In *Walters* v. *Drew*, a son by a mere recital was permitted to take by implication, and so prevent the estate from going over. A devise was, "if A die without issue the estate to go to B," and A took an estate by implication. *Cases temp. Hardwicke* 258; *Fearne* 300. By giving an estate tail to *Tobias*, the intention of the testator is preserved, and the estate is kept in the line of *Tobias* in preference to that of *John.*

The opinion of the Court was delivered by

Gibson, C. J.—This is a question depending on intention rather than on any controverted rule of law, and one without any apparent difficulty. The plaintiffs insist that these limitations present a case of concurrent remainders dependent on a contingency with a double aspect: while the defendant insists that the general and paramount intent was to secure the estate to the children of *Tobias* at all events, and without regard to the time of their birth; that to effectuate this intent, it is necessary either to imply the existence of an estate in tail male in *Tobias* himself, or to sustain the limitation to his children as an executory devise, supposing the estate to have descended at the death of the widow to the testator's right heirs, in order to await the expected contingency which was to happen, if at all, within the lifetime of *Tobias* and the usual period of gestation afterwards.

Granting that subordinate objects must yield to the general intent, and that to effect it an estate may be enlarged, restricted or implied, yet it is evident that to strain the limitation to the children of *Tobias* so as to give their father an estate tail, would dislocate every joint and articulation of what seems to have been the general and para-

mount design. An adequate provision had been made for *Tobias*, it is to be presumed, in the devise to him of the mansion-house and farm though burthened with a pecuniary charge; and the object to be accomplished by the limitation in question, was evidently to secure the land in contest to his children or the children of *John*, without subjecting it to his debts, or exposing it to the accidents that might befall it as his property. That the precaution taken to effect this might have been eluded, had there been an estate tail in him, by turning it into a fee, is too obvious to need remark. Without having children of his own, he could by the same means have disappointed another principal object of the testator in the further limitation to the children of *John*, who were intended to take certainly in any other event than the existence of children born to *Tobias* himself. The object was not so much to vest the estate in these children at all events, as to protect it from the acts or disposition of their father. What if *Tobias* had suffered a common recovery, and the present were a contest between the plaintiffs and a purchaser under a judgment against him, or, to make the case more glaring, between such a purchaser and his own children? The construction contended for, fatal as it must have proved to the testator's whole plan, would have been thought a monstrous one. But his children were directed in express terms to take a fee; which would have been inconsistent with the derivation of an estate tail from him. To imply an estate in him, then, that would be subversive of the leading objects of the will, could be justified on no principle of construction. So that the question is whether the limitation to his children can be supported as an executory devise; and the decision of it must be governed by the testator's intent in respect to the time of its vesting.

If it be found that the estate was to go over at the death of the widow, to whom an estate of freehold was given, we shall have one of the plainest cases in the world, of concurrent remainders limited to take effect on the happening of a contingency with a double aspect—much more so than that presented by the limitations in *Dunwoodie* v. *Reed*. The devise over is so expressed in this will as to indicate what has been supposed an apparent intent that it should take effect *after* and not *at* the death of the widow—a difference of little account in common parlance, and absolutely worthless in the expression of an intention accidentally suffered to rest in the loose memoranda of a scrivener, intended at the time to be but the material of a more precise and formal declaration of the testator's will. Were it important to ascertain the exact sense in which this word "after" was used by the scrivener, it might be done by adverting to the clause in which the testator directs the other land devised to the children of *John* to be valued "after" the death of their mother, to whom it was given for their support during her life by way of exception out of the fee; and there it was used incontrovertibly to denote the very point of time when her interest should cease. It is supposed, however, that as the testator's widow followed him in little more

than a month from the date of the will, he could scarce have supposed it probable that *Tobias* would marry and procreate within the apparently short compass of her life; and that he never could have meditated a disposition which, according to the plaintiffs' interpretation of it, would, on any calculation of the chances, almost certainly prove abortive. We are left without information, by the verdict, of the widow's constitution and age; but the testator has nowhere intimated that the probable duration of her life was, in his opinion, such as to preclude a reasonable expectation of children from *Tobias* before its termination. The estate was to be taken by the children at a valuation of it to be made by the testator, or men appointed by him; and if the latter, he could not have supposed it probable that all the men would survive *Tobias*, without which the purpose to be effected by their appointment would have been frustrated. If it be said that he contemplated a valuation to be made presently, the remark is open to this objection that, familiar as he must have been with the changes in the price of land that are perpetually taking place, he would scarce have expected it to be a just or reasonable one at the period of his son's death. It would, therefore, seem fair to conclude, that the making of this valuation, and the consequent vesting of the successful limitation over, were coupled in his mind with the death of the widow. But the consequence of postponing them till the possibility of children by *Tobias* should have become extinct, would be inconsistent with any reasonable presumption of intent in another view. No presumption of an intent to die intestate as to any part of the estate, is to be made, where the words of the testator will carry the whole; and certainly no such intent is apparent here. Yet, according to the hypothesis of the defendant, the estate descended to the testator's right heirs at the death of the widow, and was partable during the interval between that event and the happening of the contingency, as in the case of a common intestacy, by the orphan's court. Can it be supposed that such a partition was thought of? Had a temporary descent been contemplated, a temporary valuation would doubtless have been directed, and to be made by the men who, according to the defendant's construction, were to appraise the portions of the children at the death of *Tobias* or the sooner happening of the contingency. But putting all this aside, the inflexible rule which demands that no limitation be deemed an executory devise if it may by any practicable construction be sustained as a contingent remainder, overbears all implications of an intention inconsistent with it, and is decisive of the question. This, too, for the all-sufficient reason that these executory devises, being inconsistent with the policy of the common law, which, on account of its abhorrence of estates commencing *in futuro*, requires all the precedent parts of the fee to pass out of the grantor at the same instant, are barely tolerated, and only in favour of the explicit declaration of one who may have been compelled to dispose of his estate when unassisted by counsel. They are therefore to be sustained but in clear cases of

absolute necessity; and nothing remains but to inquire whether the present is such. In the first place, then, there was a sufficient particular estate of freehold in the widow; next there were limitations after her death, to the male heirs of *Tobias*, if he should have any, in fee; or in default of such heirs, to the males of John; and finally these limitations were concurrent and in defeasance of each other. What more was necessary to give effect to all the practicable parts of the testator's plan? As contingent limitations of a remainder, they would have been effectual to preserve the estate for *all* the children of *Tobias*, had *any* been born in time to take; for their remainder having vested in some of them, would undoubtedly have opened to let in the rest though subsequently born. But in the succession of the events that have taken place, the limitation to them having been passed by, is gone for ever; and the estate is irrevocably vested in those who answered the description in the posterior limitations at the death of the particular tenant.

Judgment affirmed.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

MIDDLE DISTRICT, JUNE TERM 1833.

Huston *against* Foster.

In order to the admission in evidence of a deed from the county commissioners, it is not necessary to show all the pre-requisites of a sale made for taxes by the treasurer to the commissioners: it is sufficient if it appear that the grantor was the treasurer, and that he did sell and convey to the commissioners.

It is not a good objection to a deed from the commissioners that the sale was made on a day to which it had been adjourned. Nor is it a good objection, that the deed was under the private seal of the commissioners and not their corporate seal.

ERROR to the common pleas of *Huntingdon* county.

This was an ejectment by *William Foster* against *Matthew Huston*, for four hundred and four acres of land. *Matthew Huston*, the defendant, was the tenant of Mrs *Cadwallader*, in whom the original title had been. The plaintiff proved that *Samuel Steel* had been treasurer of Huntingdon county for the year 1820, and then offered in evidence a deed from him to the commissioners for the land in dispute, sold in that year for taxes. It was objected to:

1. Because, under the acts of assembly, it required a specific case before they could purchase, and it lies upon them to show, that that case had occurred, before the deed could be received in evidence.

2. Because, where a deed is made by the commissioners, it must be supported by proof of all the pre-requisites of the act of assembly; it is not embraced by the terms of the act of 1815; that act only applies to sales by the treasurer.

3. The sale was not made on the day fixed by the act of assembly for that purpose.

4. The deed was not sealed with the corporate seal of the county commissioners.

The proof was then made that the sale was adjourned from the day appointed by law, to the day on which it was sold. The deed was under the private seals of the commissioners.

The objections were overruled, and exception taken by defendant. The court instructed the jury, that the plaintiff was entitled to recover, who found a verdict accordingly.

The admission of the evidence and instruction of the court were assigned for error.

Potter, for plaintiff in error, referred to the act of 13th of March 1815, sect. 2, 4 and 6, and 16 *Serg. & Rawle* 351.

A. P. Wilson and *Miles*, contra, cited, 2 *Yeates* 331 ; 3 *Yeates* 186.

The opinion of the Court was delivered by

Gibson, C. J.—By the common law, which views every invasion of the sanctity of property with peculiar jealousy, an authority to divest the title of another is required to be strictly pursued, and as the maxim *omnia rite presumuntur* is appropriate but to judicial proceedings, no intendment in respect to the exercise of it is to be made in favour of what does not appear; so that every act whose performance is made a condition of the divesture, must be shown by proof. It is this principle which requires the assignees of a bankrupt, in an action against a third person, to show the commission and the regularity of the proceedings under it up to the assignment by the commissioners : and it was a misapprehension of, perhaps its existence—certainly of its nature and extent, which baffled the attempts of the legislature to remedy the inconvenience of its application to sales of unseated land for taxes. The object was not attained till the act of 1815 dispensed with the principle altogether : the curative provision of which, however, has been said in the argument to be adapted only to sales by the treasurer and not to those by the commissioners, having bought in for the benefit of the county. The remark is undoubtedly just; and why? Because those sales were never in need of it ; the common law principle, which it was intended to subvert, being inapplicable to a disposition by the owner himself. Here it is admitted that the title had passed from the original proprietor to the county, which was disposing, by the instrumentality of its officers, of its own land ; so that in an action between its vendee and a wrong-doer, every intendment is to be made in support of the sale. The act, indeed, points out a mode by which an indefeasible title may undoubtedly be vested in the purchaser; but I am unprepared to say that its provisions in this particular are not barely directory ; or that the admitted want of an intermediate link would be

fatal to the title between the purchaser, and any one but the county or a person standing in privity to it. But were it otherwise, no such want of a link is shown or admitted here, the reliance of the defendant being on the absence of proof by the other side. As to the offer to redeem, or rather to appropriate money paid on general account to the taxes due on this particular tract, that could not have been done without the consent of the former owner; and taking for granted that *M'Cahen* was authorized to act for Mrs *Cadwallader*, yet when he called on the commissioners to do so, the day of redemption had gone by, and the title of the county had become indefeasible.

The objection to the deed for want of the corporate seal, rests on different ground. Originally a deed under the common seal of county commissioners was utterly void; though it appears, by the *Lessee of Watt* v. *Gillmore*, 2 *Yeates* 330; *Lessee of Simon* v. *Brown*, 3 *Yeates* 186, and *M'Cay* v. *Dickinson College*, 5 *Serg. & Rawle* 254; that such a seal had been sometimes used. How far its use has since been sanctioned it might not perhaps be necessary to determine. But we find the legislature declaring, in the act of the 11th of April 1799, that "the commissioners of each county within the commonwealth shall have and use one common seal for the purpose of sealing their *proceedings;* and *copies* of the same, when signed and sealed by the commissioners, and attested by their clerk, shall be good evidence of *such* proceedings on the trial of any cause in any of the courts of this commonwealth." This provision seems to relate rather to the record of transactions in the office, that may require an act of authentication, than to a single determinate act *in pais*, which going into the hands of the grantee, is susceptible of authentication as other conveyances are. Certainly the mode of authenticating these deeds is not so conclusively directed by statute, as to exclude the mode of execution authorized by the common law, before county commissioners were recognized as a *quasi* corporation. Every consideration of policy requires a deed thus executed to be sustained; nor does the recognition of it imply that the use of the common seal in similar cases is necessarily to be held bad. Many titles might be shaken by it; and it certainly would not conduce to the repose of the community, to hold the commissioners strictly to the observance of technicalities. Even where they have affixed their common seal to their individual signatures, it would require no great stress of ingenuity to take it separately for the seal of each, adopted for the occasion. However that might be, the presence of the private seals of the commissioners puts the validity of the instrument beyond the reach of dispute, and authorized the unqualified direction given by the judge that the plaintiff was entitled to recover.

Judgment affirmed.

Crawford *against* The Commonwealth.

The same security which is afforded by an administration bond to the heirs of an intestate results to the commonwealth in the case of the death of an intestate without heirs or known kindred.

In case of an intestacy without heirs or known kindred, the commonwealth can not maintain a *scire facias* upon a judgment obtained against the administrators on their administration bond to recover the personal estate, without first having established her right by an inquest confirmed by the court.

ERROR to the common pleas of *Mifflin* county.

This was a *scire facias* upon a judgment obtained upon an administration bond, in which "The Commonwealth, for escheat on information of *Daniel Rodebaugh*," was plaintiff, and "*David Crawford* and *Joseph Douglass* surviving obligors in a bond with *James Mackey* and *William Beale*, Esq." were defendants; on the trial of which the following facts appeared in evidence.

Henry Doran, late of Mifflin county, died intestate, and as was alleged without any known kindred. Upon his death letters of administration were granted by the register of the county to *David Crawford* one of the plaintiffs in error, and *James Mackey* since deceased, who gave an administration bond in the usual form, with *Joseph Douglass* the other plaintiff in error, and *William Beale*, as their sureties. No administration account being settled in conformity to the condition of this bond, a suit was afterwards brought upon it against *David Crawford* and *Joseph Douglass*; *James Mackey* and *William Beale* having both died in the mean time; to January term 1823, in the court of common pleas of Mifflin county, in which a cautionary judgment was obtained against them for the amount of the penalty of the bond.

On the 9th of August 1821, the auditor-general of the state, upon the information of *Daniel Rodebaugh*, according to the directions of the first section of the act of assembly, entitled "a supplement to an act entitled an act to declare and regulate escheats," passed the 2d of April 1821, appointed *James M'Dowell*, Esq. of Mifflin county, his deputy, who issued his precept to the sheriff of the county, commanding him to summon and empannel twenty-four good and lawful men of the same county, to come before the said deputy at the place and on the day therein mentioned; to inquire whether the said *Henry Doran* had died without heirs or known kindred; and whether he, at the time of his death, was seised or possessed of any, and what estate, real or personal in the same county; and also in whose hands or possession the same was. In pursuance of this precept an inquisition was taken on the 28th of December 1821, which was certified, and transmitted by the deputy of the auditor-general into

[Crawford v. The Commonwealth.]

the office of the prothonotary of the common pleas of Mifflin county. The inquest found, that *Henry Doran* died on the 25th of November 1815, intestate, and without heirs or any known kindred; and that he was possessed at the time of his death of personal estate in Mifflin county of the value of 1146 dollars and 99 cents, which had escheated to the commonwealth of Pennsylvania; and after enumerating or specifying of what it consisted, they also found that it had come into the hands of *David Crawford* and *James Mackey* administrators of *Henry Doran*, and had been eloigned by them.

At the time of taking this inquisition *James Mackey* was dead; and *Mary Mackey*, his widow, who was the executrix of his last will, joined *David Crawford* in giving a bond with security to the commonwealth, to appear at the next court of common pleas to be held for the county of Mifflin, to traverse the inquisition, and in case the same should be confirmed, to render to the commonwealth the estate found to have been in their hands or that of *David Crawford* and *James Mackey*. A certificate to this effect was given, and indorsed by the deputy of the auditor-general upon the inquisition when it was transmitted by him into the prothonotary's office, and is in the following words: "To *Robert Craig*, Esq. prothonotary, court of common pleas of Mifflin county; I do hereby certify that the above inquisition, in pursuance of the annexed writ, was held, signed and sealed as set forth in the same, and that *Mary Mackey and David Crawford have given bond to traverse the inquisition. James M'Dowell*, deputy auditor-general."

The following entries were made in the docket of the prothonotary of the court of common pleas of Mifflin county, to wit:

"*The Commonwealth of Pennsylvania* v. *Mary Mackey, Executrix of James Mackey deceased*, January term 1822. No. 150. Writ of inquisition of escheat on the estate of *Henry Doran* deceased, April term 1822. Bond of defendant filed, and the bail excepted to. Rule to justify by the court.

"*Commonwealth of Pennsylvania* v. *David Crawford*, No. 151, same term. Writ of inquisition of escheat on the estate of *Henry Doran* deceased. Bond of defendant filed, and the bail excepted to. Rule to justify by the court."

Here all further proceeding upon this inquisition closed.

The counsel for defendants requested the court to charge the jury on the following points.

1. That no damages can be recovered in this suit in the name of the *Commonwealth ex relatione Daniel Rodebaugh*; as neither the informer nor the commonwealth, in case of escheated articles, have any remedy on the administration bond against the administrators or their bail; but must pursue the method pointed out by the act of assembly relative to escheats, to obtain possession of the escheated property.

2. That in this case no writ of seizure issued on the inquisition of escheats, to seize the property of *Doran* in the hands of *Crawford* and

[Crawford v. The Commonwealth.]

Mackey, or to seize their own property, as directed by the act of assembly; no damages can be recovered against *Joseph Douglass*, the bail in this case.

3. That by return of the inquisition and the power given the commonwealth to issue a writ of seizure, to take into the custody of the law the property of *Doran*, or the property of *Crawford* and *Mackey*, it was imperative on the commonwealth to do so, and the neglect to issue this writ of seizure discharged *Joseph Douglass*, the bail.

4. That the proceedings in suits No. 150 and No. 151 of January term 1822, preclude the maintenance of this suit until those proceedings are finally disposed of.

5. That neither *David Crawford* nor *Mary Mackey* had legal notice of the time or place of holding the inquisition of escheat: the plaintiff cannot recover.

6. That the finding of the inquisition is uncertain, and such a finding as no legal process could be issued upon it.

7. That the finding of the inquest was, that the property was eloigned; but they do not find by whom it was eloigned.

8. That the *scire facias* in this case must issue at the instance of some person aggrieved, and that *Daniel Rodebaugh* has not so conducted the proceedings in this case as to enable him to maintain this suit.

1. To the first point the court answers, that it is their opinion the bond given by the administrators and their bail does stand for the use of all persons interested in the personal property to be administered; that the bond covers the right of the commonwealth when personal property has escheated, and when it has been converted into money by administrators; and that when the inquest was found, and the property declared escheated, the commonwealth, on the relation of the informant, might proceed to recover the escheated personal property which was received by the administrators in due administration in this way.

2 and 3. That in this case a writ of seizure was not necessary; nor can we instruct you that *Douglass* was discharged, because that writ did not issue; nor was it imperative on the commonwealth to issue a writ of seizure when the property was legally in the possession of *Mackey* and *Crawford* in the course of administration.

4. We do not think the proceedings on suits No. 150 and No. 151 of January term 1822, preclude the maintaining of this suit.

5. The very suits, No. 150 and No. 151, given in evidence by defendant, show, that they had notice of the inquest. The escheator-general swears he believes *Crawford* was present; we have said and offered to admit evidence by defendant of any payment that may have been made by the administrators; nay, we instruct you to allow for administering the estate, although no inventory has ever been filed, nor administration account settled.

6. We think the finding sufficiently certain to call upon the defendant to show what became of the estate.

[Crawford v. The Commonwealth.]

7. The finding was, that the sum of 1146 dollars and 99 cents was in the hands of the administrators, and has been by them eloigned. This we think is finding by whom eloigned.

8. We think the *scire facias* well issued. *Rodebaugh* might or might not be named in this case; this suit we instruct you can be maintained. The money goes into the state treasury. *Rodebaugh*, if he receives any of it, gives bond for it agreeably to law. We cannot instruct you as required.

This opinion of the court was assigned for error.

Parker and *Potter*, for plaintiffs in error.
M'Dowell, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—On the trial of this cause in the court below, several bills of exception were taken by the counsel for the plaintiffs in error, to the opinion of the court, admitting evidence offered by the defendant in error and objected to by the plaintiffs in error, which have been assigned among other matters for error here. We however perceive no error in them. The court below was so obviously right in admitting the evidence, that it requires no reasoning in order to make it more palpable.

The other matters involved in the errors assigned, which seem to be worthy of notice, may be reduced to two questions.

First. Are the commonwealth and her informer entitled to maintain a writ of *scire facias* upon a judgment had upon an administration bond, to recover the value of the personal estate of the intestate, which came into the hands and possession of the administrators, and to which she has a right by escheat?

Second. If she has a right to maintain a writ of *scire facias* for such purpose, can she do it without first having her right established by means of an inquest; and if after that, a bond and security be given to her by the administrators to traverse the inquisition, can she maintain such suit before that the inquisition shall be confirmed?

In respect to the first question, it may be premised, that it has never been questioned, but that the next of kin to the intestate might maintain an action on the administration bond against the administrators and their sureties, to recover their respective proportions or purparts of the intestate's personal estate, which came into the hands of the administrators. Although it was at one time held in England that the creditors of the intestate could not sue and recover upon the administration bond given there, of which ours is a copy, even in the case of a *devastavit* by the administrator; yet it was ever considered, that the bond was given especially, and at this time exclusively for the benefit of the next of kin or those entitled to have the personal estate of the intestate, which remained after paying his debts and the expenses of the administration. It has however been adjudged since, that in England, as also in this state, that a creditor, in case

of his being unable to collect his debt of the administrator on account of his having committed a *devastavit*, may have an action upon the administration bond against the sureties by way of redress. This being the settled law, where there are next of kin, it must be obvious to every one, that where there are none, that the commonwealth comes in lieu of them; and why shall she not be entitled to the same security and the same remedy, having asserted and established her right to the estate by escheat, in the manner prescribed by law, that are given to the next of kin? I must confess that I am unable to perceive any. The commonwealth in such case may well be considered the *ultima hæres*, and as succeeding to all the rights and all the remedies of the heirs or next of kin in ordinary cases. The application of this principle may perhaps appear more striking in the case of a bastard's dying intestate, than that of any other. According to the common law, which remains unaltered in this particular by statute, he has no heir or next of kin. He is *nullius filius*, and in England the king is considered to be his heir, *ultimus hæres*. By the civil law a bastard was deemed *filius populi;* and here I see no good reason why he may not be denominated *filius reipublicæ*, and upon his dying intestate, the commonwealth be looked upon as his next of kin, under our acts of assembly regulating and declaring in what cases the estates of intestates shall escheat. But it has been argued that as the act of the 29th of September 1787, entitled "an act to declare and regulate escheats," directs, by the fourth section thereof, a course of proceeding against the party himself directly, in whose hands or possession the estate shall be found, that that is the only remedy which the commonwealth has or can resort to. This section declares that immediately "upon the finding of the inquisition, the escheator-general [now the auditor-general or his deputy, by the act of the 2d of April 1821, sec. 1] shall issue his writ, directed to the sheriff or coroner of the county, as the case shall require, commanding him to seize, attach and secure the goods and chattels so found to be escheated as aforesaid, in whose hands soever the same shall be found; or if it be found by the said inquest that the said goods and chatters be eloigned, then to seize and attach so much of the goods and chattels of the person or persons who shall have eloigned the same, as shall be equal in value to the goods and chattels which he eloigned, unless the person or persons in whose hands or possession such goods and chattels be found, give bond to the commonwealth, with sufficient security, to appear at the next supreme court [but, since the act of the 2d of April 1821, at the next court of common pleas] thereafter, to traverse the said inquisition, and likewise, in case the same be confirmed, to render to the commonwealth the same goods and chattels found to be in his or her hands; which writ, so to be issued, shall be duly returned to the escheator [now auditor] general, together with an inventory and appraisement of the goods and chattels, if any, which he seized and attached by virtue thereof; and the said sheriff or coroner shall there-

upon sell the same goods and chattels at public auction, after ten days public notice of such sale, and shall, without delay, pay over the moneys therefrom arising, to the treasurer of the commonwealth, &c." In answer to this, it is sufficient to observe, that although a very summary remedy is given by this act to the commonwealth to obtain possession of the personal estate of which the intestate died possessed, or otherwise an adequate compensation for it in case it should be eloigned, yet there are no words in the act which seem to indicate the slightest intention, upon the part of the legislature, to confine the commonwealth to that course of proceeding alone, or to prevent her from pursuing any other that another party interested in the estate, and having a right to it, would be entitled to select and adopt. The commonwealth being once invested with the right to the estate, the law will afford her, as incident to such right, every remedy provided generally for the recovery of it; whether it be a remedy existing at common law, or be given by statute; and the remedy furnished to the commonwealth in this particular case by the act of assembly, must be considered cumulative, which she may pursue, in proper cases, as often as it is likely to prove effectual, at pleasure.

I come now to the consideration of the second question. It appears to me, that wherever the commonwealth intends to assert her right by escheat to the estate of an intestate, that it must be done by means of an inquest, as directed by the acts of 1787 and 1821 already referred to, and in part recited; and that until her right shall be established by the report of the inquest in her favour, she can maintain no action, nor cause any writ to be issued, for the recovery of the possession of the property. But having established her right of property by an inquest of office found in her favour, she may have all the personal property secured, if not eloigned, or, if found by the inquest to be eloigned, have other property of the party who eloigned it, of equal value, taken in place thereof, by the sheriff or coroner of the county, under a writ to him directed for that purpose, from the deputy of the auditor-general, according to the acts of assembly cited above; or she may commence and prosecute, for the recovery of the same, any action that the next of kin, had there been any, would have been entitled to support. Indeed, I think it is very manifest, from the provisions of these acts, that the legislature, instead of intending to restrict and limit the commonwealth, in her course of proceeding to obtain possession of the goods and chattels belonging to, or to recover the debts owing to an intestate who died without heirs or any known kindred, within what is allowed by law to heirs or next of kin where there are such, that they intended to extend it beyond any thing that these latter can claim; for by the eighth section of the act of 1787 it is expressly declared, that after it shall have been found by the inquest, that the intestate died without heirs or any known kindred, the commonwealth shall be entitled to recover for her use, "by information of debt or action in the nature of

trover and conversion, or upon the case, for money had and received, as the case may require," any part of the personal estate of such intestate or moneys owing to him, and not mentioned or included in the inquisition, in the hands or possession of or owing by any person dwelling within the state. Thus enabling the commonwealth, after the inquest of office found in her favour, to demand and recover the goods and chattels belonging to the intestate at the time of his decease, from those in whose possession they may be, and the debts or moneys owing to the deceased from the debtors, whoever they may be; while the next of kin, when there are any, are confined, and compelled to claim every thing of the kind, through and by means of the administrators, without whom the personal estate cannot be collected and secured.

Although the commonwealth, after an inquisition held establishing her right by escheat to the personal property of an intestate, enumerating it specifically, and finding it to be in the hands of administrators, within the year after the decease of the intestate, would seem, according to the letter of the act of 1787, to have a right to seize and take the property immediately out of the hands and possession of the administrators, even before the expiration of the year, the time that is allowed by subsequent acts of assembly, for ascertaining the creditors of the intestate, if there should be any, the amount of their claims, and for paying them off; yet I am inclined to think, that in such case, no writ for seizure of the goods or property can be issued or executed until after the year. It is evident, from the second section of the act of 1787, which, among other things, declares that the "estate shall escheat to the commonwealth, *subject to all legal demands on the same*," that the legislature did not intend to preclude the creditors of the intestate from being paid their claims out of his estate; but as no mode is provided by this or any of the subsequent acts on the subject of escheat, whereby creditors shall obtain payment of their debts out of the estate of the intestate, nor yet any agent or officer of the commonwealth thereby authorized to make payment to them, of their debts, out of the estate of which their debtor died seised or possessed, may it not be fairly presumed, or inferred, that the legislature intended that this should be done by administrators, were there any? otherwise, to take the estate out of the hands of the administrators before the expiration of the year, the time allowed in all cases for paying the debts of the deceased debtor before distribution shall be made amongst the next of kin, might prevent creditors from receiving payment of their debts; and if so, would certainly defeat the intention of the legislature, as it appears to me; which was, that the commonwealth should only be entitled to claim the surplus of the intestate's estate, which should remain after payment of all his debts. In cases, however, where no letters of administration have been granted upon the estate of the intestate, I do not consider that the commonwealth is bound, after having established her right to the property by the report of an in-

quest, to delay a moment in proceeding to seize upon and take possession of it. For if creditors should become embarrassed in obtaining payment of their debts by it, they must attribute it to their own negligence, in not having taken out letters of administration, as they had a right to do, before the commonwealth had established her right to the property. Although I incline to entertain this opinion at present, yet I do not wish to be understood as being entirely free from doubt in regard to its correctness; nor, that I shall consider myself bound by it hereafter, in a case where it may become necessary to decide the point; for in this case it does not necessarily arise, as much more than one year elapsed after administration was taken out upon the estate of *Henry Doran*, before the commonwealth moved at all in the business. But still, notwithstanding that greatly more than the year had elapsed, and that the commonwealth was not prevented, on that ground, from proceeding, upon the return of the inquisition in her favour, to issue a writ from the deputy of the auditor-general, directed to the sheriff, commanding him to seize the goods and chattels of the administrators, equal, in value, to the personal estate of the intestate which the inquest found came to their hands and had been eloigned by them, and to dispose of them for the use of the commonwealth, in the manner prescribed by the act of 1787; I think that the bond given by *David Crawford*, the surviving administrator, and *Mary Mackey*, the executrix of *James Mackey*, the deceased administrator, to the commonwealth, with security, to traverse the inquisition, arrested all further proceeding on the part of the commonwealth, until the traverse thus taken was finally disposed of, and the inquisition confirmed. By this traverse of the inquisition, every fact found by it was denied, and put in issue; and not merely the fact, as has been alleged, that the administrators had eloigned the estate which came into their hands, but the fact, that the intestate died without heirs, or any known kindred, as well as every other fact found by the inquest, which was material to entitle the commonwealth to the estate of the intestate, was denied, and completely put in issue by the traverse. The traverse of an inquisition, *ex vi termini*, is a denial of all the facts found by it. This being the case, it follows that the presumption of right, on the part of the commonwealth, which arose from the finding of the inquest, was repelled by the traverse; and until the inquisition should be confirmed, either upon a trial of the traverse or upon its being dismissed for sufficient cause, the right of the commonwealth to the estate of the intestate could not be said to be established; nor do I conceive, that according to the terms of the act of 1787, that she had any right to have a writ under that act to seize the property, or that she could maintain an action in any form against the administrators or their sureties, or any other person whomsoever, for the estate of the intestate, or any part of it, except to prosecute a trial of the traverse, and to have the inquisition confirmed first.

It, however, has been contended, that because an exception was

taken to the sufficiency of the security given in the bond for the traverse of the inquisition, it ought to be considered as if no traverse had ever been taken, or existed. But it appears that the bond, with the security, was certified by the deputy himself of the auditor-general, to have been given without any objection being made by him then to the sufficiency of the security. This certificate was made on the back of the inquisition, and was transmitted with it into the prothonotary's office by the deputy of the auditor-general; and no exception entered or taken to the sufficiency of the security, until some time, at least one term, three months, afterwards. During this interim, there is no pretence for saying, that the traverse was not regularly and well taken and entered. The administrators had done all that the act required, in order to complete their traverse. Now admitting that the exception to the sufficiency of the security entered after that the bond had been so taken to the commonwealth by the deputy of the auditor-general, and so certified by him to the prothonotary, without any exception at the time, was all regular; still the traverse must be considered as still pending, until that the sufficiency or insufficiency of the security was decided on by the proper tribunal, and the traverse dismissed, and the inquisition confirmed, for want of sufficient security; or, otherwise, the traverse tried, and the inquisition thereupon confirmed. As I, then, consider that the traverse was regularly and well taken in this case, for any thing that appears to the contrary, and as the inquisition has never been confirmed in any way, the commonwealth was premature in suing out the writ of *scire facias;* and cannot maintain this action. But the court below having given a contrary direction to the jury on this point, their judgment must, therefore, be reversed. In all other respects or matters, I think, that the direction of the court below to the jury, and their answers to the points submitted by the counsel for the plaintiffs in error, were right.

The judgment is reversed.

Ruth and wife *against* Kutz.

A general verdict for the plaintiff in an action of slander is bad, when it is upon a declaration containing two counts, in one of which the words laid to have been spoken are actionable, and in the other not actionable.

Such a verdict having been rendered in the circuit court, and a judgment upon the faultless count, the court *in bank* set aside the verdict and judgment, and directed *a venire de novo* to issue.

APPEAL from the circuit court of *Northumberland* county.

This was an action of slander by *Peter Ruth* and wife against *Peter Kutz*, in which the declaration contained two counts, laying these words, with the proper inuendoes, to have been spoken: "that Mrs *Ruth* one evening came to his bedside in her shift tail, and told him she thought she heard some one knock below, and if one of his boys had not coughed, he did not know what would have happened." And in the second count these words: "that *Peter Smith* kept house with a whore, and he could prove that the daughter they had was not *Ruth's* child. *Christian Dunkle* is her father, but she laid it to *Ruth*, and that *Ruth* married her; and he would be damned if he could not prove all that." The jury found a verdict for the plaintiff for 2000 dollars damages; and the court directed, upon a motion in arrest of judgment having been made, that judgment should be entered upon the second count. The defendant appealed, and that motion was insisted upon in the court in bank, and argued by

Greenough, for appellant, who cited, 1 *Bin.* 587; *Tid. Prac.* 831; *Doug.* 378; 4 *Yeates* 442; 5 *Johns. Rep.* 476; 3 *Wils.* 177.

Daniel and *Hepburn*, contra, cited, 1 *Bin.* 393; 5 *Serg. & Rawle* 321; 2 *Johns. Rep.* 283.

The opinion of the Court was delivered by

Gibson, C. J.—One of the counts is incurably bad; the words contained in it impute acts which evince a libidinous temperament, but do not constitute an indictable offence. The defect was discovered too late to have it rectified; evidence having been given, and the verdict recorded on all the counts; consequently the rendition of the judgment on the good counts only, is not to be sustained. The question, therefore, is, whether the judgment is to be set aside and finally arrested, in which event the plaintiffs would have to begin again; or only suspended, in order to give them an opportunity to have damages assessed on the good counts by means of a *venire facias de novo*. Formerly judgment was said to be arrested when it was but

suspended for extrinsic causes, by setting aside the verdict or granting a new trial; but the term is more recently applied with greater accuracy to the perpetual stay occasioned by a defect in the record. That the judgment may, strictly speaking, be arrested in a case like the present, is unquestionable, for such has been the course of our practice; but that a more beneficial practice may be adopted without impugning our own decisions or the common law, is equally unquestionable. In *Auger* v. *Wilkins*, 1 *Barnes* 337, where entire damages had been assessed for several sets of scandalous words, some of which were not actionable, the plaintiff had a *venire de novo* to sever his damages, according to what was said to be an ancient rule of the court; and the same thing was done in *Smith* v. *Howard*, *Ibid.* 340. *Barnes* is good authority, I believe, for points of practice, though for little beside. But these two cases are taken for law by Sergeant *Williams* in his note to *Hambleton* v. *Vere*, 2 *Saund.* 171, *c*; at least so far as regards the common pleas, to which he seems to consider the rule as peculiar. That it were so, would furnish no objection to it here, as our own practice has been modelled principally on the practice of that court. But it is certain that the *venire de novo* is a common process in every court for the trial of causes, without distinction as to the peculiarities of the forum. (*a*) The authorities for this are arranged in a note to *Davies* v. *Pierce*, 2 *Term Rep.* 126; the clear result of which is, that it is grantable: 1. Where the jury have been improperly chosen, or irregularly returned; 2. Where the jury have misconducted themselves; 3. Where entire damages are given on several counts, including a defective one; 4. Where an imperfect verdict is found; 5. Where a demurrer to evidence is such that the court can not give judgment on it. Each of these positions is fortified by an array of authorities in the note alluded to, and reinforced by a formidable train in a note to *Johnstone* v. *Sutton*, 1 *Term Rep.* 528. The instances of this process, scattered through the books, show it to have been the ordinary and appropriate remedy for almost every species of mis-trial; and the only doubt in respect to it seems to have been, not whether it could be awarded below, but whether it could be awarded, for any other cause than imperfectness of the verdict, by a court of error. To us who are in the daily practice of awarding it in error, this doubt seems to have been a fastidious one; and perhaps it would at present appear so in Westminster Hall, where, notwithstanding the decision in *Street* v. *Hopkinson*, 2 *Stra.* 1055, that a court of error can not award it at all, the practice has been settled for half a century in accordance with our own. The propriety of this writ, in the cases already indicated, seems to be at length securely settled on the basis of authority; and as to the fitness and justice of it, no one can assign a reason why a plaintiff

(*a*) In *Eddows* v. *Hopkins*, *Doug.* 632, it seems to have been considered also as the rule of the king's bench; and in *Grant* v. *Astle*, *Doug.* 696, it was held by all the judges of that court to be the proper course on a reversal in error.

should be subjected to the vexation and delay of a new action, when his damages may be assessed on the faultless counts in his declaration, with equal or greater advantage to the defendant himself, who would be compelled to bear his own costs, if the judgment were arrested, and the entire costs of a new proceeding in the event of a recovery. Whether a *venire de novo* would be awarded, if all the counts were faulty but in form, it is unnecessary to determine. Perhaps the authorities would not warrant it, though the convenience of it, and the liberality of our practice in matters of amendment, would plead strongly for it. In a case like the present, however, a resort to the practice of the English courts is warranted both by reason and authority, and we feel no hesitation in adopting, or, to speak more plainly, reviving it.

Judgment and verdict set aside and *venire de novo* awarded.

Mather *against* Clark.

A writ of *scire facias* upon a mortgage need not be served upon the terre tenant of the mortgaged premises, to make him a party to the proceeding. A title by the sheriff upon a judgment against the mortgagor alone is good.

In an ejectment against a terre tenant of mortgaged premises by the purchaser at sheriff's sale, the defendant may avail himself of any defence which he might have made if he had been a party to the *scire facias* suit. But if he had been served with notice of the suit upon the mortgage the judgment would have been conclusive upon him and his title.

ERROR to the common pleas of *Bradford* county.

This was an ejectment by *John Mather* against *Benjamin Clark and terre tenants* for a tract of land. On the 2d of October 1809 *Thomas Overton* conveyed the land to *Benjamin Clark* the defendant; and afterwards, on the 31st of October 1809, he executed a mortgage on the same land to *George Fox*, *Joseph P. Norris* and *Jonathan Smith*, to secure the payment of 2500 dollars. The mortgage was recorded on the 31st of January 1810, the conveyance on the 3d of September 1810. The mortgage was sued by writ of *scire facias* to May term 1825, by *George Fox* and others against *Thomas Overton*, and judgment obtained thereon; upon which a *levari facias* issued to February term 1826, and the land was sold to *George Fox*, and conveyed by the sheriff to him; he conveyed to *Thomas Ellicott*, who conveyed to *John Mather*, the plaintiff in this ejectment.

The court below instructed the jury, that "if they believed that *Clark*, since his purchase of the land from *Overton* and taking a deed which was recorded in 1810, has been in possession of the land from that time to the present, he would be a terre tenant and entitled to notice of the proceedings on the *scire facias*; and his not having been

made a party to the suit, renders the judgment inoperative as it regards his rights."

This opinion was assigned for error.

Cunningham, for plaintiff in error.

E. Lewis and *Willetson*, contra, cited, 4 *Bac. Ab. tit. Scire Facias* 418; *Phil. Ev.* 422; 16 *Serg. & Rawle* 432.

The opinion of the Court was delivered by

KENNEDY, J.—To prevent misapprehension on the part of the jury it is highly necessary that the court, in charging them on any point of law at the instance of either party, should be careful, where the facts out of which the question or point arises, are controverted by the parties, not to direct the jury on the point of law as if the facts were conceded to be as assumed or claimed by the party at whose request the jury are so charged; because it must be obvious that they may be imposed on or misled in regard to their duty, which is, to ascertain first, and find how the facts are. They may suppose that they are to take from the court not only the law, but the facts too as they have been assumed for the purpose of laying down the law to them. In order, however, to avoid any such mistake or misapprehension taking place with the jury, the court ought, in charging them, to refer distinctly to the controversy between the parties in respect to the facts, and to tell the jury that if they should find the facts to be as the one party contends they are, then the law is so and so; but if they should find the facts to be as the other party claims they are, then the law is different; and to state to them how it is, as they shall find the facts to be in one way or the other. It is possible that in the present case the president judge may have made such observations to the jury in regard to the contest between the parties, about their finding the facts, as was contended for by the one party or the other, to which his charge as committed to writing has a reference, so as to have given a different view of the matter to the jury from what there is great reason to apprehend they must have received, if nothing more were said than what is contained in the written charge.

If such further remarks were made, in connexion with what has been reduced to writing, so as to have presented to the jury an intelligible and correct view and application of the law to this part of the case between the parties, as they should happen to find the facts to be in the one way or the other, as claimed by either party; it is to be regretted that they were not also committed to writing and sent up as part of the charge. Be this, however, as it may, inasmuch as it does not appear to have been so, we can not presume it was, and must take the charge as it has been given in writing.

It is easy to perceive from the case, that there must have been a contest, on the trial of the cause, between the parties, as to the facts to which the charge is applicable: the plaintiff contending that

the mortgage from *Thomas Overton* to *George Fox* and others, although bearing a date on its face posterior to the date mentioned on the face of the deed of conveyance from *Thomas Overton* to *Benjamin Clark*, was in reality executed and delivered before the execution and delivery of the latter; while the defendant *Clark* contended that each was executed and delivered on their respective dates. In this latter state of things the charge of the court would have been correct; but if the facts of the case were as the plaintiff contended, then the charge was clearly erroneous. The court tell the jury, "if they believe that *Clark*, *since his purchase* of the land of *Overton*, and *taking* a deed which was recorded in 1810, has been in the possession of the land from that time to the present, he would be a terre tenant and *entitled to notice* of the *scire facias* proceedings; and his *not being made a party* in that cause, renders the judgment *inoperative* as regards his *rights*." Now, although *Clark* had been in the possession of the land from the time he actually got his deed from *Overton*, and was properly and technically terre-tenant thereof, yet if the mortgage from *Overton* to *Fox* and others, which embraced the same with other land, was actually executed and delivered by *Overton* to the mortgagees before *Clark's* deed was delivered to him, it would most unquestionably operate on his *right* to the land, and bind it as effectually as if it had continued to be the property of *Overton*, the mortgagor. The court, as I conceive, ought first to have submitted to the jury their right to ascertain and to find how these facts were; and only in case they found the mortgage to have been delivered and executed after the execution and delivery of the deed to *Clark*, was it, that his right to the land could not be affected by the mortgage and the proceeding by *scire facias* upon it; but if they found the facts otherwise, then the mortgage bound the land, and the right of *Clark* to it was affected by it and the proceeding thereon by *scire facias*, whether he was terre tenant of it or not, and although he had had the possession of it from the time of his purchase without any notice of the *scire facias*, unless he could show that the mortgage had been paid or released. But I must further observe, that it appears to me at least doubtful, whether the court by their charge did not intend to instruct the jury that if they believed that *Clark* had lived upon the land from the time of his purchase and getting his deed for it of *Overton*, no matter when that was, he thereby became terre tenant of the land, and his right to it therefore could not be affected by the judgment and sale upon the mortgage, as no notice of the writ of *scire facias* sued out was served upon him. If this be the meaning of the charge, it is clearly erroneous; for it is not necessary in this state to give notice to the terre tenant of the mortgaged premises of the suing out of the writ of *scire facias*, or to make him a party to the proceeding in any way, in order to make a good and valid sale of the land to satisfy the debt or money due upon the mortgage. Such notice may be given, and I think it commendable to do so, and in some instances it has been

given; still I believe it has been more frequently omitted, at least in some parts of the state, and has become a practice too long settled to be overturned by a judicial decision. The only difference that a want of notice to the terre tenant makes is, that he will be permitted to make any available defence against the purchaser of the land at sheriff's sale, that he might have set up on the trial of the *scire facias* in case it had been served upon him; see *Nace* v. *Hollenback*, 1 *Serg. & Rawle* 548; but if it has been served upon him he can make no such defence against the sheriff's vendee. *Ibid.* 540. *Blythe* v. *M'Clintock*, 7 *Serg. & Rawle* 341. But the circumstance of his having become a terre tenant of the land, after the execution of a mortgage, which was valid in its original concoction, and has been duly recorded, will form no defence whatever, either upon the trial of the *scire facias*, or that of the ejectment brought against him by the sheriff's vendee. Nothing short of payment or a release of the mortgage can avail in such a case.

Believing that the charge of the court below was calculated to mislead the jury as to the law of the case, I therefore think that their judgment ought to be reversed.

Judgment reversed, and a *venire facias de novo* awarded.

Culp *against* Fisher.

A covenant by a mortgagee that he will not proceed to collect the money secured by his mortgage by a sale of one of several tracts of land mortgaged, which had been separated and sold by the mortgagor to a third person, will not release other tracts from the lien of the mortgage, or discharge them from liability to pay.

A formal release of one of several tracts of land from the lien of a mortgage, will not discharge the other lands from the incumbrance.

A mortgagor, in the possession of the mortgaged lands, sold one tract, and gave a bond to the purchaser to indemnify him against the mortgage; the mortgage was afterwards sued, and judgment obtained against the terre tenant, without actual notice to the mortgagor, upon which the land was levied and sold: in an action upon the bond of indemnity it was held, that if the mortgagor had notice of the suit upon the mortgage he would have been concluded, and obliged to repay the purchase money to the plaintiff; if he had not notice of it, he might make the same defence in the suit upon the bond, that he might have made upon that on the mortgage.

The possession of land is equivalent to the interest upon the purchase money; and in an action to recover back purchase money paid for land, interest is recoverable from the time of eviction, when that eviction proceeds from a prior incumbrance, and not paramount title.

APPEAL from the circuit court of *Northumberland* county.

In this case *Samuel Culp* was plaintiff; and *William Kase*, administrator of *Henry Fisher*, defendant.

The action is in debt on a bond of 4000 dollars, dated the 8th of April 1814, and was given by *Joseph Fox* as principal, and *Henry Fisher*,

the defendant's intestate, and *Abia John* as sureties, to the plaintiff *Samuel Culp*, and in its terms is joint and several.

Ann Pemberton, of the city of Philadelphia, sold and conveyed in fee simple to *Joseph Fox* two tracts of land lying in Shamokin township in Northumberland county, containing in the whole six hundred and eleven acres and one hundred and fifty two perches, besides allowance of six per cent for roads, &c. and on the 1st day of May 1813, took a mortgage of *Fox* upon the land, to secure the payment of the purchase money, 4943 dollars and 83 cents, to be paid in four equal annual payments, without interest. *Joseph Fox* afterwards sold one hundred and sixty-eight acres and thirty-five perches of this land to *Samuel Culp* the plaintiff for 2095 dollars and 50 cents, which was paid by *Culp* to *Fox;* and *Fox* and his wife, by their deed bearing date the 1st day of April 1814, conveyed it in fee to *Culp*. The bond in suit was given to indemnify *Samuel Culp* against the mortgage which is referred to and in fact recited in the bond, the condition of which is in these words: "the condition of this obligation is such, that if the above bounden obligors, or either of them, truly keep the said *Samuel Culp* clear and harmless of a certain mortgage, obtained by *Ann Pemberton* of the city of Philadelphia, upon said land so sold to said *Culp*, so that he shall receive no damage therefrom," &c.

Joseph Fox sold and conveyed other parts of the land which he bought of *Ann Pemberton* to different persons; retaining still about two hundred and thirty acres to himself. And among the number was *Abia John*, one of the sureties in the bond; to whom he had sold one hundred and fifty acres of it, and by his deed, dated the 22d of March 1814, had conveyed the same in fee accordingly. *Ann Pemberton*, by her deed, bearing date the 10th day of April 1818, after reciting therein the mortgage, the conveyance of the one hundred and fifty acres to *Abia John*, and the request of *Abia John* that the said one hundred and fifty acres should be exempted from the effect and operation of the mortgage, in consideration thereof, and of one dollar then paid to her, by *Abia John*, "covenanted, promised and agreed to and with the said *Abia John*, his heirs, executors, administrators and assigns, that she would not take in execution or levy upon the said one hundred and fifty acres, &c. by reason of the above recited mortgage, or any process or proceedings under the same."

Joseph Fox, at different times, from the date of the mortgage to the 10th of April 1818, paid 2884 dollars and 15 cents upon it; but the residue still remaining unpaid, *Ann Pemberton*, to August term, in the common pleas of Northumberland county, sued out a writ of *scire facias* upon her mortgage, which was returned served by the sheriff on *Samuel Culp*, the plaintiff in this suit, and other terre tenants, and *nihil* as to *Joseph Fox*, the mortgagee; whereupon an *alias scire facias* was sued out, returnable to November, the next succeeding term, to which the return of *nihil* was made by the sheriff. Afterwards, on the 17th of November 1830, there being no

appearance of the mortgagee or any of the terre tenants to the *scire facias*, a judgment was rendered by the court, awarding execution against the mortgaged premises in favour of the mortgagee, for the balance due upon the mortgage. She accordingly took out a writ of *levari facias*, returnable to January term 1831, under which the sheriff sold the whole of the mortgaged lands to *Ann Pemberton*, for 3000 dollars; a sum not sufficient to cover the balance due to her; and on the 26th of January 1831, made and acknowledged deeds of conveyance to her in due form, for the lands so sold. Afterwards, in the month of March following, *Samuel Culp*, the plaintiff in this action, took a lease of *Ann Pemberton* for the one hundred and sixty-eight acres and thirty-five perches which he had bought of *Joseph Fox*, and then became her tenant, and afterwards commenced this suit.

The defendant, on the trial of the cause, gave evidence, after an objection by the plaintiff to its admissibility which was overruled by the court, of the declaration of the plaintiff, made before the sale of the land by the sheriff, and after the proceeding by *scire facias* had been commenced, when the probability of such a sale being made was mentioned to him by the witnesses, that he did not care how soon it should take place, that he would rather have his money; that if it were sold he would get his money that he paid for the land back with interest, and could buy better land with it. The defendant's counsel further offered to prove, that *Benjamin Tilghman* Esq., agent of *Ann Pemberton*, wrote a letter to *Joseph Fox* and others, agreeing, that upon the payment to her of the amount due by the different purchasers of *Fox* to him, she would execute a release to them respectively for the lands so purchased of *Fox*. This was objected to by the plaintiff's counsel, and the evidence overruled by the court.

The plaintiff then gave evidence, that *Abia John* and two of his sons were present at the sale of the land by the sheriff and bid for it; that the plaintiff had paid his purchase money; and that Mr *Tilghman*, the attorney of Mrs *Pemberton*, said, he had received nearly all the money that was so paid by the plaintiff.

The testimony being closed on both sides, the court charged the jury, among other things, that the defendant was injured in consequence of the plaintiff's not having given him notice of the suit brought upon the mortgage; and that he therefore ought not to recover the amount of the money paid by him to *Joseph Fox* as the price of the one hundred and sixty-eight acres and thirty-five perches, which he bought of him, and which he had lost by the sheriff's sale under the execution issued upon the judgment had in the suit on the mortgage; but only an average proportion of the mortgage money due at the time of the sheriff's sale, to be ascertained by this rule; that as the whole land liable to the balance of the mortgage money was to that amount, so was the land lost by the plaintiff to the sum that he was entitled to recover. The jury accordingly

adopted this rule laid down by the court, and gave a verdict in favour of the plaintiff for 1641 dollars 95 cents; instead of 2095 dollars 50 cents, the amount of the purchase money paid by him, with interest thereon from the time that he was evicted, or compelled to take a lease of Mrs *Pemberton*, which was the sum that he claimed to be entitled to recover. This direction of the court to the jury, and the admission of the evidence objected to by the plaintiff's counsel, in all of which they say that the court erred, have been assigned as reasons on the part of the plaintiff for his appeal, and for his claiming a new trial.

The defendant's counsel allege, that the circuit court erred in rejecting the letter of Mr *Tilghman*, the agent of *Ann Pemberton*, which they offered in evidence; and again, in refusing to instruct the jury, that the defendant's intestate was discharged from his bond, upon either of two grounds: first, because *Samuel Culp* the plaintiff had given him or his representatives no notice of the suit by *scire facias* upon the mortgage; and, second, because the covenant, or release as they call it, of Mrs *Pemberton* given to *Abia John*, not to take in execution or levy upon his one hundred and fifty acres, part of the mortgaged lands, was a discharge of the lien of the mortgage upon all the lands included in it; and they have assigned these matters as the reasons for the appeal taken by the defendant and for setting aside the verdict and granting a new trial.

Packer, for appellant and defendant, contended, that the plaintiff, having given no notice to the bail of the proceedings against him upon the mortgage of *Ann Pemberton*, and having, *by his own negligence or fraud*, suffered judgment to go against him by default, and his land to be sold, he is not in law or equity entitled to recover upon the bond of indemnity. The record of eviction was insufficient: it appearing that he had neither defended himself nor given notice to the bail to defend; and it appearing also from the evidence, that there were collusion and connivance between the plaintiff himself and the mortgagee in procuring the land to be sold, &c. He cited, 2 *Penns. Bl.* 80; 1 *Penns. Bl.* 436; *Luther* v. *Poultney*, 4 *Binn.* 61, 352; *Bender* v. *Fromberger*, 4 *Dall.* 436; *Fulwiler* v. *Baugher*, 15 *Serg. & Rawle* 55. *Platt on Covenants* 314, 321, 355; "even if a party recovers, without title, through the negligence of the covenantee, he cannot sue the covenantor for this disturbance." "The action of covenant only extends to the consequence of legal acts," and the reason will be found in the case of *Hayes* v. *Bickerstaffe*, that the law shall never judge, that a man covenants against the wrongful acts of strangers. "Where the eviction was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises, it was not shown that a breach of the covenant contained in the lease had been committed, and judgment was given for the defendant."

He also contended, that previously to the passage of the act of

the 2d of April 1822, a mortgagee could not release a part of mortgaged premises without discharging the lien upon all the land mortgaged; and more particularly when, as in the present case, the land had been subdivided by the mortgagor, and was now held by third persons, whose interests were liable to be affected. The doctrine is well settled, that where two or more are jointly bound, or where an entire thing is subject to an incumbrance, that a release of one, or a part, will operate as a release of the whole; 5 *Wils. Bac.* 702, 713, 694; 2 *Vern.* 286; 1 *Atk.* 294; 2 *Hen. & Munf.* 38; 2 *Coke Litt.* 280, 232, 236; 2 *Bridg. Eq. Dig.* 347, 175; *Fitz. N. B.* 238; 7 *Mass. T. R.* 355; 2 *Day's Cases* 142; *Franklin* v. *Gorham*, 1 *Ld. Raym.* 419, 691; 1 *Shaw* 46; 2 *Salk.* 573; *Cro. Eliz.* 352; 2 *Penns. Rep.* 26; 1 *Penns. Bl.* 433, 425; 2 *Penns. Practice* 274; 1 *Rawle's Rep.* 391; *Milliken* v. *Brown*, 14 *Serg. & Rawle* 425. The release of *Ann Pemberton* to *Abia John* is an entire discharge of the lien. A covenant not to sue *till* a particular time, is not a release; but a covenant perpetual, as that I will not sue at all, is a release, and may be pleaded as such; *Jacob's Law Dict. tit. Release* 2; 2 *Salk.* 573, &c.

As to the measure of damages. This was not a covenant of seisin, which relates to title, nor for quiet enjoyment, which relates to possession. It is a covenant against a particular incumbrance. It is an indemnity against an *incumbrance*, which did not necessarily contemplate an ouster or eviction. The giving of the bond of indemnity, and the amount agreed by *Culp* to be paid for the land, had no relation to each other. *Culp* bought the land, and gave his own bond for the payment of the purchase money. The mortgage of *Ann Pemberton* continued upon the land, and this bond of indemnity was subsequently entered into, covenanting to save *Culp* harmless from the said mortgage. Whatever injury, therefore, *Culp* sustained, by reason of the mortgage, is the measure of damage which he ought to recover from the bail. It is immaterial to us how much or how little he gave for the land. The question is, what is the extent of the injury he has sustained, against which we indemnified him? and this, if he be entitled to recover at all, is all he can claim. By ascertaining the whole amount due at the time of sale, and apportioning it to the whole of the lands covered by the mortgage, it could have been ascertained what portion of it fell upon *Culp's* land; and by paying off this amount to the mortgagee, he might have procured a release. Had he done so, the amount thus paid would doubtless have been the measure of his damage, and this was the principle sustained by the circuit court.

Grier and *Greenough*, for plaintiffs, denied the positions assumed on the part of the appellant and defendant. The measure of damage is the amount paid by *Culp* for the land, with interest from the time of eviction. 8 *Johns.* 198; *Vanslyck* v. *Kimble*, 4 *Johns.* 1; 3 *Caines* 111; 7 *Johns.* 173; 11 *Mass.* 300. *Culp* was

not bound to give notice to the bail. It was their duty to remove the incumbrance, and if they had a knowledge of the existence of the *scire facias* against him upon the mortgage, it is sufficient. The paper executed by *Ann Pemberton* to *Abia John*, is not a release, but a covenant not to sue, or not to levy upon a portion of the land; but if it be a release, it does not discharge the lien of the mortgage. A mortgagee had a right, even before the late act of assembly, to release a part of the land, without invalidating the lien of the mortgage.

The opinion of the Court was delivered by

KENNEDY, J.—The letter of Mr *Tilghman* was very properly rejected. It at most would only have tended to show the willingness of Mrs *Pemberton* to give releases to those who had bought parts of the lands mortgaged to her, from *Joseph Fox*, upon their coming forward and paying to her the money, that they were to pay to *Fox* for the lands, until her mortgage was paid off; but unless it had been shown also, that she had released *Samuel Culp's* land by carrying such proposition into effect, it could not avail the defendant in this case any thing, to show that she was at all times willing to do so, without showing that such proposal by her had been carried into execution. She was not bound to acquit any part of the lands included in her mortgage, until she had received the whole amount of the money due upon it; and even a promise made by her to acquit any part of the land, upon receiving part of the money due to her, would have been gratuitous, and without consideration; and therefore would not have been binding upon her, until she had received the money paid to her upon the faith of her promise. But as nothing of this kind was pretended, it is evident that the testimony was unavailable and inadmissible.

The second reason cannot be sustained; and it appears to me that a moment's reflection upon the nature of the obligation which the defendant's intestate had brought himself under to the plaintiff, will be sufficient to satisfy any disinterested mind of the truth of this. He bound himself in the most express terms to keep the plaintiff "clear and harmless of the mortgage, so that he should receive no damage therefrom." Now, if the mortgage money was unpaid at the time the defendant's intestate thus bound himself, there was but one way of obtaining a complete indemnity for the plaintiff against the mortgage, which was, by paying it; but if it was then paid, it would have been sufficient for the defendant's intestate or his representatives, to show that in case the mortgage money should be demanded at any subsequent time, and it is only in the case of the mortgage having been paid or released by the mortgagee before it was sued, that the defendant's intestate or his estate could have been injured or affected by the want of notice. The object of giving notice was, not that the defendant or his intestate might come forward and pay, but to show that the mortgage had already been

paid or released. If, however, it was not paid or released, and there was really no defence that could be made against the payment of it, the intestate may be said to have neglected his duty, in not having paid, or otherwise procured payment to have been made; and he and his representatives, therefore, have no right to complain. On the other hand, if it were paid or discharged in any way, and the defendant, or his intestate in his life time, could have shown that, upon notice given to either, the most then that he ought to be permitted to claim from the want of notice would be, to show, as a defence to and discharge from the plaintiff's claim in this case, that the mortgage was satisfied before the plaintiff's land was taken in execution under it. This he was permitted to do by the circuit court, so far as he was able, and if he failed in it, the necessary conclusion is, that the mortgage was not paid or released in any way before that time; and the defendant or his intestate, in contemplation of law, cannot be considered as having sustained either loss or injury by the neglect of the plaintiff to give notice of the suit upon the mortgage; because if the intestate of the defendant had paid the mortgage off, as in effect he had bound himself to do, it must be presumed that *Culp*, the plaintiff, would never have been troubled with a suit upon the mortgage, or have lost his land by it.

The third reason of the defendant is the next in order to be considered. The covenant of Mrs *Pemberton* "not to take in execution or levy upon *Abia John's* one hundred and fifty acres," part of the land included in the mortgage, has been treated by the defendant's counsel as if it were a formal release of so much of the mortgaged premises from the lien of the mortgage. In form it is certainly not a release; but it is said that where an obligee *covenants* not to sue the obligor at all, he may plead it as a *release*. *Hodges* v. *Smith*, *Cro. Eliz.* 623; *Smith* v. *Mapleback*, 1 *Turn. Rep.* 446; *Burgh* v. *Preston*, 8 *Turn. Rep.* 486. But although he may plead it as a release, the authorities referred to show that it is not because it is in *fact* or in *law* a *release* that he may do so, but he shall be permitted to do so merely in order to avoid *circuity* of action; that is, in effect, to set off the breach of the obligee's covenant not to sue on the bond against his claim on it. See also *White* v. *Dingley*, 4 *Mass.* 433; *Upham* v. *Smith*, 7 *Mass.* 265; *Sewall* v. *Sparrow*, 16 *Mass.* 24. If it were properly and strictly a release, then a covenant not to sue one of two joint and several obligors would be a discharge of both, as a formal release certainly is. See 2 *Roll. Abr.* 412, G, *pl.* 4, 5; *Clayton* v. *Kyneston*, 2 *Salk.* 574; 2 *Saund.* 47, *t*, note per Sergeant *Williams*. But the law is not so where it is only a *covenant* not to sue one of two joint and several obligors; it is considered barely a *covenant* and not a release; and the obligee may still sue the other obligor. 2 *Salk.* 575; *Lacy* v. *Kyneston*, 12 *Mod.* 551; 2 *Ld. Raym.* 959; *S. C.* 2 *Saund.* 47, *t*, note; *Wand* v. *Johnson*, 6 *Mund.* 8; *Shotwell* v. *Miller*, 1 *Coxe* 81; *Rowley* v. *Stoddard*, 7 *Johns. Rep.* 207; *Chandler* v. *Herrick*, 19 *Johns. Rep.* 129; *Shed* v. *Pierce*, 17 *Mass.*

Rep. 623; *Sewall* v. *Sparrow*, 16 *Mass.* 24; *Ruggles* v. *Patton*, 8 *Mass. Rep.* 480. The defendant's counsel, considering it as a release, have therefore likened the release of part of the land charged with the mortgage for the payment of the money, to the case of rent charged on three acres of land, where he who has the rent, releases all his right in one acre, and it is said that the release extinguishes the whole rent. 5 *Bac. Abr. tit. Release*, 694, 713. And the reason assigned for it is, because it all issues out of every part of the land, and it cannot be apportioned. *Ibid.* 713. But this cannot be said of money, or a debt charged on land by a mortgage. For although the whole of the money is charged upon every part and parcel of the land embraced by the mortgage, yet if the land so mortgaged consists of several tracts or parcels, when the mortgage money comes to be raised by a judicial sale of it, under an execution sued out upon a judgment had upon the mortgage for that purpose, each tract or parcel must be sold separately; and no more of it can be sold than shall be found sufficient to raise the money claimed upon the execution. Hence it is clear that there is no analogy between the two cases, nor do I think that the case before us can be justly compared to any other to which it has been attempted to be likened. So that I am decidedly of opinion, that had Mrs *Pemberton* given even a formal release, instead of a covenant, it would not have extinguished her claim upon the residue of the land as a security for her money under the mortgage. In *Hicks* v. *Bingham*, 11 *Mass. Rep.* 300, where the mortgagee of two parcels of land *released* one of them to the assignee of the mortgagor, it does not appear to have entered into the mind of any one concerned in the case that it discharged the whole mortgage. Having now disposed of the reasons assigned by the defendant for a new trial, I shall proceed to notice those of the plaintiff.

The first is that the evidence of *Solomon Figley*, *John Rupley* and *George B. King*, was improperly admitted by the court. This I think was not so; for although the facts which they testified to, of themselves amounted to nothing, and could have no influence in determining the cause, either in favour of or against either party, yet as they were offered to be proved in connection with other circumstances, which were not proved as alleged, tending in some slight degree to show collusion between *Ann Pemberton* and the plaintiff in this cause, or that the plaintiff had conducted himself, in respect to the claim of *Ann Pemberton* on the mortgage, in such a way as apparently to prejudice the defendant, it would not perhaps have been right to have rejected the testimony: and as I feel satisfied that after it was given, it could have done the plaintiff no harm with the jury, the admission of it, therefore, would be no sufficient ground for granting a new trial, although it were clearly irrelevant.

The next and indeed the only reason among all that have been stated, for which we think a new trial ought to be granted, is, that the court was wrong in the rule which was laid down to the jury for

ascertaining the amount that the plaintiff was entitled to recover. The court seems to have taken up the idea, in the hurry of the trial, that the defendant or his intestate might, if notice had been given by the plaintiff of the suit when it was commenced on the mortgage, have settled and adjusted the claim in some way more favourable to his interest; and that he was injured to a certain extent through the neglect of the plaintiff to give such notice; and that a proportionable abatement of this claim ought therefore to be made. But certainly it was incumbent upon the intestate of the defendant to have informed himself, and to have known whether or not the mortgage money was paid; and if not, to have paid or settled it, and thus to have prevented the suit altogether from being brought upon the mortgage. The plaintiff by declining to give the notice, no matter whether wilfully or inadvertently, took upon himself the risk of the defendant's not being able to show that the mortgage was paid off or discharged, and nothing more; for if it was not, the neglect of duty was chargeable entirely to the intestate of the defendant, in not having discharged it before suit was brought upon it; but the plaintiff, by giving a notice to the defendant or his intestate, would have relieved himself from all responsibility in respect to the mortgage being paid or discharged, and have cast it entirely upon the intestate or the defendant; for if it had been paid, and the intestate or the defendant, after notice of the suit upon the mortgage, had failed or neglected to show it, and the plaintiff's land had been sold as it was, the defendant would not have been permitted on the trial of this action to have given any thing in evidence, with a view to show that the mortgage was discharged before the judgment for execution was had upon the mortgage. Taking this view then of this part of the case, I can see no reasonable objection to the plaintiff's recovering the 2095 dollars and 50 cents, the amount of the price which he paid for the land, with interest thereon from March 1831, when he was forced to give up the land and become the tenant of Mrs *Pemberton.* It can not be denied but that he has lost at least that amount indirectly in money, through the default of the intestate of the defendant to perform the condition of his bond. The land must be considered, as between the parties to this suit, worth what the plaintiff gave for it; so that, by the loss of the land, he has lost his money. The profits of the land as long as he was permitted to receive them for his own use, may fairly be considered as equivalent to the interest upon the price of the land down to the time of taking the lease, when he became accountable for the rents and profits of the land to another; but from that time it is nothing more than just and equitable that he should be allowed the interest upon the 2095 dollars and 95 cents.

Judgment reversed and a new trial granted.

Campbell *against* Wilson.

A tract of land with a man and his family residing upon it, is not unseated as to that part which is not cleared, whether the settler has entered with or without title; and can not be sold for taxes.

A tract of land, upon which there is an actual residence, can not be sold for taxes, whether the resident has property sufficient to pay the taxes or not.

A tract of land originally having in it four hundred acres, one hundred were divided off and sold, and the purchaser occupied it; the residue of the tract assessed in the name of the original warrantee is the subject of sale for taxes, as unseated.

ERROR to the common pleas of *Juniata* county.

This was an action of ejectment by *George Wilson* against *William Campbell* for a tract of land. The plaintiff claimed title under a warrant to *Bartholomew Wistar*, patent to *Samuel Otis*, and sale for taxes in 1820 to him. The defendant showed no title, but relied upon his possession. The question turned upon the validity of the sale for taxes. All the facts are fully stated in the opinion of his honour who delivered that of the court.

A. S. Wilson and *Greenough*, for plaintiff in error.
A. Parker and *J. Fisher*, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The first error assigned in this case, which is that the taxes exceeded the amount of the sale and therefore the treasurer's deed is void and vests no title in the purchaser, does not appear to exist in point of fact. Neither does it appear that any such question was made upon the trial of the cause. On the contrary, it would seem, from the president judge's charge, that the plaintiff in error had alleged on the trial, that there was a surplus of money arising from the treasurer's sale of the land after paying the taxes and costs, and, because no bond was given, as required by the act of assembly in such case, for the alleged surplus, had requested the court below to charge the jury that the sale was void on that ground. The court however, believing from the evidence adduced that the amount of the money produced by the sale was just equal to that of the taxes and costs, very properly refused to give this direction.

The next and only remaining error complained of, is, that "the court erred in charging the jury that a tract of land with a man and his family residing upon it, is unseated except so far as the settler has actually cleared and occupied, unless he entered with title." Now although I am clearly of opinion that the court erred in laying down this proposition thus broadly as law, yet I think it was unnecessary, as the case that was presented by the evidence given, did not require it. As soon as a person enters upon an unseated tract of

land, whether as an intruder, or tenant under a lease from the owner, and becomes a resident upon it, or, without becoming a resident, improves and occupies it in such a way as to furnish upon the land the means of making and levying the taxes by distress, it must be considered in law as *seated*, and no longer liable to be assessed with taxes, and sold for them if they remain unpaid. The commissioners or the assessors need not inquire, nor are they bound to know, by what authority he has entered upon and taken possession of the land. It is sufficient for them to see that he is there, and that he has sufficient personal property upon the land whereon to distrain and levy the amount of the taxes; and if so, they are bound to regard it as a *seated* tract of land. It is only those lands which are not occupied in such a manner as to afford the opportunity of levying the taxes assessed by distress, that the legislature intended should be sold; and the remedy of selling them was resorted to as a measure of absolute necessity, because it was found after full experience to be impracticable to collect the taxes otherwise. All this is in accordance with the doctrine laid down in the case of *Erwin* v. *Helm*, 13 *Serg. & Rawle* 154, 155. The case under consideration has been likened to that, and it has been urged that it rules the present. In the case of *Erwin* v. *Helm*, *Van Gordon*, who lived upon the land at the time of the assessment, was there as a tenant, by agreement, under one of the owners of a tenancy in common of the fee; the possession of any one of whom, either by himself in person or by his tenant, was the possession of the whole of the land so held in common, and might be considered the possession of the others. And although *Van Gordon*, who was thus in the actual possession at the time of the assessment, objected to being assessed for more than fifty-six acres, yet neither he nor his lessor, without the consent of the other owners in fee of the land, could have divided and set apart the fifty-six acres from the residue of the tract; nor does it appear in the case that any thing of this kind had been attempted. He was therefore considered, for the purposes of taxation, as a tenant of the whole tract. And it is there said that it is "where the possession as well as the estates of the owners are distinct, that the tenant in the possession can in no event be liable in respect of more than he actually holds," page 155.

In the case before us, the land appears to have been patented to *Samuel A. Otis* upon a warrant to *Bartholomew Wistar*, and a survey made in pursuance thereof containing four hundred and thirty-six acres and thirty-five perches. In 1814, the whole of the four hundred and thirty-six acres and thirty-five perches were assessed in the name of the warrantee, and in that same year a *William Patterson* came to live on the land in a house and improvement which he had made, claiming about fifty acres of the *Bartholomew Wistar* survey, with about as much more of other adjoining land without it. These hundred acres were assessed to him as the owner thereof, in that same year; and on the 26th of August of that year, the common-

wealth granted to him a warrant for them, under which he had a survey made on the 5th of January following. After this, down to 1819 inclusive, but three hundred acres were assessed in the name of *Bartholomew Wistar* the warrantee, and during the same period one hundred acres were assessed to *William Patterson*. Now, although the dwelling house of *William Patterson* was within the lines of the *Wistar* survey, yet *Patterson* did not, like *Van Gordon*, enter upon and claim the land as tenant to any one under that warrant, he took possession adversely, designating precisely the extent of his claim by metes and bounds; for otherwise, had he taken possession generally without such designation, he would and ought to have been considered a settler upon the *Wistar* survey, and as giving to it the character of a *seated* tract. But to prevent all misapprehension, as well in respect to the nature as to the extent of his claim, immediately upon taking possession of it, he returned it to the commissioners or the assessor as containing one hundred acres, and at the same time, or shortly after, obtained a warrant for it from the commonwealth. Under these circumstances I can see no objection whatever to the residue of the *Wistar* survey, which *Patterson* excluded from his survey, being deemed unseated, unless the improvement made by *King* or *Campbell*, the plaintiff in error, changed the character of it. *King*, it seems, in the year 1816, commenced clearing some of the land, and in the course of that and the following year cleared three or four acres without raising a house or living upon it. After him the plaintiff in error continued the clearing of the land to some small extent, till 1820, when he erected a house upon it and took up his residence there, without making known either the nature or extent of his claim. If the improvement of either had been made before the assessment of the taxes for which the land was sold, and of such a nature as to have afforded the collector of the taxes a chance of levying them by distress, in the manner prescribed by the act of assembly in such case, I would have considered the land seated, and the sale made of it for the taxes void; for I think the president judge of the court below mistook the law when he said, that the tract of land thus entered on by a person without title or colour of it, although he might have property sufficient at all times upon the land to enable the collector to make the taxes out of it by distress, that the land was, notwithstanding, still to be deemed unseated, so far as it was not actually improved and enclosed by him. In this his honour appears to have confounded the rule that is applied to possession, where the statute of limitations is set up by a mere intruder, to bar the claim of the owner to the land, with the principle that is to determine and distinguish seated land from unseated, for the purposes of taxation. If the object be alike in both cases, to wit, to prevent an unnecessary sacrifice or forfeiture of men's rights to their lands, the possession of the intruder must be extended to the whole tract in the latter case, for the same reason that it is limited to the *pedis possessio* in the former. If either *King* or *Campbell* had had improve-

ments on and possession of the land without a residence, but at the same time personal property there at all times sufficient to have satisfied the taxes by a distress and sale of it, from the time of the first assessment down, that would have been a matter to have been referred to the jury, upon which the direction of the court as to the law respecting it, might have been asked; but as it was probably thought that the testimony was not sufficient to raise this question, it does not appear to have been made. And although I think that the actual residence of a man upon the land will give it the character of seated land, and be sufficient to prevent it from being sold as unseated for the taxes assessed upon it during such residence, whether he have property on it or not sufficient to pay the taxes; for in contemplation of the acts of assembly, residence upon the land is deemed a sufficient security for the payment of the taxes; yet it does not appear from the evidence that either *King* or *Campbell* had at any time property enough on the land to pay the taxes; nor does it appear that *Campbell*, who is the plaintiff in error, even contended on the trial that ever either of them had, before he moved upon the land to reside, which was not until the year 1820, one year at least after all the taxes, for which the land was sold, had been assessed. After a careful review of this case, and the evidence given on the trial of it, I think that part of the *Wistar* survey which was not included within *Patterson's* one hundred acres was unseated land, and continued to be so, for aught that appeared, down to the time that the plaintiff in error went on it to live; that the sale of it for taxes was therefore valid, and that the judgment of the court below ought to be affirmed.

Judgment affirmed.

Summerville *against* Holliday.

The presumption of law that a debt has been paid, or a right of way has been granted, or a bond or mortgage or legacy has been satisfied, are those deductions from the existence of a fact, to which a legal effect is attached beyond their nature and operation. They are either conclusive, and may be made by the court, or inconclusive and can only be found by a jury. It is not so much a presumption that the money has been paid, or a right of way granted, as it is the substitution of an artificial rule in the place of evidence or belief, after a delay which may have been destructive of the evidence on which a belief might be justly founded.

Where a presumption of payment from the lapse of time is not repelled by circumstances accounting for the delay, it is the duty of the court to instruct the jury that they are bound by the legal presumption; but where there is some circumstance given in evidence to account for the delay, it is the duty of the court to refer to the jury, as an open question of fact, to determine as to actual payment.

ERROR to the common pleas of *Huntingdon* county.

This was an action of debt for a legacy, by *Ruth Summerville* for the use of *Thomas Jackson*, against *Robert Wallace, administrator de bonis non* with the will annexed of *William Holliday* deceased, with notice to *William Holliday* (the third), devisee of *William Holliday* (the second), who was the devisee of *William Holliday* (the second), and *terre tenant.* The pleas of defendants were *nil debet* and *payment with leave, &c.*

The plaintiff to support the issue on his part, gave the following evidence.

11th July 1796. Will of *William Holliday* (the first), proved 30th September 1796, by which the testator wills,

1. That his debts be discharged.

2. That his wife shall have the tract of land he lives on during his life.

3. That his son *John* shall have the tract of land he (*John*) now lives on, containing about three hundred acres.

4. "It is my will that my son *William* shall have the tract of land he now lives on, containing about three hundred acres, provided he pays to my other three children, viz. *John*, *Ruth* and *Mary*, the sum of 300 pounds, to be paid in the following manner—100 pounds to be paid in one year after my decease, and 200 pounds to be paid one year after, deducting the sum of 24 pounds 5 shillings, which I now owe him out of said 300 pounds."

5. That his daughters *Ruth* and *Mary* shall have each half of the tract of land he then lived on.

29th June 1819. Will of *William Holliday* (the second), proved 10th November 1819, by which the testator wills,

1. That all his debts and funeral expenses be paid.

2. "I give and bequeath to my son *William Holliday*, and to his

heirs and assigns for ever, the tract of land on which I now live, as bequeathed to me by my father *William Holliday*, supposed to contain three hundred acres, or thereabouts, subject to the paying of my debts, and the following legacies and payments of money, to wit,

3. "To my daughter *Polly*, now married to *James Laverty*, 200 dollars.

4. "To my daughter *Jane*, married to *C. Denlinger*, 200 dollars.

5. "To my daughter *Ann*, married to *Daniel O'Lery*, 200 dollars.

6. "To my daughter *Dorcas Holliday*, 200 dollars, &c.

"My son *William Holliday* is to have the remainder of my personal or mixed estate.

"I wish my executors to rent the lands that *Daniel O'Lery* and *James Laverty* now live on, supposed to be fifty acres. Two-thirds of the rent to be paid yearly, to my two daughters *Polly Laverty* and *Ann O'Lery*, until 100 dollars is paid to each of them; and one-third of the rent of the aforesaid lands to be retained by my executors, to assist in defraying the cost that may accrue on the ejectment brought against me by *James Summerville*, in right of *Ruth Summerville* and others, and the action now pending between myself and those claiming under *Henry Baugher*." His son *William* not to pay any money, except the 200 dollars to his daughters *Polly* and *Ann*, until all the said lawsuits are finally ended, and then, if any of the land lost, the said legacies to abate in proportion.

His son *William* and *Joseph M'Cune* appointed executors.

Record read in case of *James Summerville* and *Ruth* his wife v. *William Holliday*. No. 53 of August term 1800, in common pleas of Huntingdon county. Summons debt 100 pounds. Narr. filed for Mrs *Ruth Summerville's* part of the 300 pounds mentioned in the will of *William Holliday*, the first.

17th January 1804. This cause by consent of parties referred to *Benjamin Elliott*, Esq., *David Stewart* Esq., *Alexander M'Connell*, Esq., *James Kerr*, Esq., and *Lazarus Lowery*.

24th January 1805. *Benjamin Elliott*, *Alexander M'Connell* and *David Stewart*, three of the said referees, report as follows:

"The subscribers, three of the auditors or referees appointed to settle the above cause, met in Hollidaysburg on the 22d of January 1805, at the house of *Samuel Galbraith*, and the parties attended before us. And after examining the cause at some length, we are of opinion, that were we to make a final decision at present, injustice would be done to the parties, as ejectments are now pending for considerable parts of the land, which is the ground of controversy between the parties. We, therefore, agree that no determination can be made until a decision is had in the case of *Lessee of Drinker* v. *William Holliday*, and the *Lessee of E. Nicholas and I. Nicholas* v. *William Holliday*, now pending in the supreme court of Pennsylvania, and to be determined in the circuit court of Huntingdon county."

12th March 1832. Jury sworn, and verdict for defendant.

10th May 1832. Writ of error filed for plaintiff.

[Summerville v. Holliday.]

18th June 1832. Judgment of common pleas reversed by supreme court.

8th Jauuary 1831. Deed of *William Holliday* (the third) to *Thomas Jackson*, for sixty acres and ninety perches, for the purpose, and by which the long contested dispute and suits between the *Nicholas* title and the *Holliday* title, so far as the *Nicholas* claim interfered with *William Holliday's* tract, was compromised and finally settled.

13th April 1830. Deed of *James Summerville* and *Ruth* his wife to *Thomas Jackson*, assigning legacy now claimed, and the said grantors' interest in the tract of land devised by *William Holliday* (the first) to the said *William Holliday's* (the first) daughters, *Ruth* and *Mary*.

Record read in case of *Lessee of Henry Drinker* v. *William Holliday* and *Sigh Clossin*. Brought in circuit court for Huntingdon county to December term 1802. Ejectment for land in Frankstown township (part of the land devised by *William Holliday*, the first, to *William Holliday*, the second). Removed to common pleas docket, No. 71 of November term 1809.

22d June 1810. A jury sworn, and verdict for defendants, and judgment. October 1811, at supreme court, writ of errror struck off, having issued irregularly.

The defendant, to support the issue on his part, offered in evidence as follows, to wit:

Record in case of *Joseph Nicholas* v. *John Holliday*, *Mary Holliday* and *John Martin*, of September term 1792. Ejectment.

May term 1801. Jury sworn, and verdict for plaintiff, and judgment.

Habere facias possessionem and *fieri facias* to September term 1801, returned Not served. *Alias habere facias* and *fieri facias* to September term 1802. *Pluries habere facias* and *fieri facias* to September term 1806, No. 5 (*prout* said record), offered by defendant, with the offer to follow this up with evidence to show that *William Holliday* (the second) and *William Holliday* (the third) were turned out of possession under this ejectment and other ejectments which will be shown.

This evidence was objected to by the plaintiff, and the court said they would receive the evidence on this principle: that so far as the defendant and his ancestor were out of possession by adverse title, the interest accruing on the legacy might be suspended; and that this opinion was given as well on principle as on the act of the parties, as now in evidence, by the plaintiff's stopping the former suit for the legacy until these and other ejectments should be determined.

To this opinion of the court the counsel for plaintiff excepted.

The record of the last said ejectment was then read by defendant.

John Patton, Esq. a witness for defendant sworn, says—"When I was sheriff, I had a writ of *habere facias possessionem* (in this last mentioned ejectment). Began on the northerly side of the tract,

[Summerville v. Holliday.]

or the claim of *Nicholas*. Ran to , came to the river, then ran across near to old *John Holliday's* improvement; left old *John's* mansion house outside of the line—*John* then lived where the old man lived; then went to the division line between the *Halding* and *M'Kinly* tracts. *William Holliday* said that was his land. I stopped and they sent for *Sigh Clossin* and agreed to leave it to his oath, who he was a tenant under. *Sigh Clossin* proved on oath he was tenant under *William Holliday*, and we then went no further. I gave possession of no land then, within the bounds of the *M'Kinly* tract. I did not deliver possession of a yard then claimed by *William Holliday*. The recovery was only against *John Holliday*."

Defendant also offered record in the case of *Lessee of William Holliday* v. *Henry Baugher*. No. 56 January term 1803, in C. P. Ejectment for fifty acres of arable land and fifty acres of woodland, (this the suit settled by the deed read heretofore of the 8th of April 1831, *William Holliday* to *Thomas Jackson*) removed to circuit court to March term 1803.

Referred. Brought back to common pleas, No. 80, November term 1809, continued to January term 1814, and jury sworn and verdict and judgment for plaintiff. Writ of error and judgment reversed the 18th of March 1816. 25th of September 1821, jury sworn and discharged for sickness of a juror. Continued to the 20th of September 1826, and then removed to circuit court to December term 1826. Referred, and, the 8th of May 1828, arbitrators chosen. Continued to March term 1829, which last said record was objected to by the plaintiff's counsel, and admitted by the court, who say—This suit or record is admitted on the principle the court before decided respecting the abatement of the interest.

To the admission thereof and opinion of the court, the counsel for the plaintiff excepted.

Burnside, President, thus charged the jury.

The first point made by the defendant is, "that the legacy for which this suit was brought was due in 1798; that the present suit was not brought until August term 1832. The presumption of law is that the legacy has been paid or released, and the plaintiff can not recover."

This court agree, and so direct the jury, that from the lapse of time the presumption is that this legacy is paid, unless there are such circumstances given in evidence which will repel that presumption, and of which the court will speak hereafter. The rule is well settled and obtains as to bonds, mortgages and judgments. All these claims will be presumed to be paid after twenty years. But in cases of bonds, judgments and mortgages, when the debt has been due twenty years, there is a presumption of payment. This presumption, like all other presumptions, may be removed by proof of the acknowledgement of the debt, payment of interest, and many other circumstances. The same principle has been extended to ad-

ministration bonds, and I see no reason why it should not apply to a legacy.

We think it does, and so instruct you, and on this point your verdict should be for the defendant, unless there are such circumstances given in evidence that will repel that presumption.

We shall proceed to consider those circumstances. A suit was brought for this legacy in 1800, about four years after the death of *William Holliday* the elder. It is referred in 1804. A report was made in 1805, that the auditors could not make a final decision, as the cases of *Drinker* v. *Holliday* and *Nicholas* v. *Holliday* were pending and undetermined; from the records in evidence, the *Nicholas* suit, or rather the *Baugher* suit against *William Holliday*, was not ended till 1815; the *Drinker* suit in 1796. The *Nicholas's* had recovered in 1801 against *John Holliday*, *Mary Holliday* and *Martin*, and issued their *habere facias*. *William Holliday* (the second) alleged they had got possession of land which belonged to him, and he brought his ejectment in 1803. This suit was tried—verdict for plaintiff, and set aside in the supreme court. This suit, and all the others undetermined, were settled by Mr *Jackson*, and settled with *William Holliday* by the deed of the 8th of January 1831. The evidence of *Adams*, we think, on this point, *weighs* little, because more than twenty years elapsed from that conversation to the bringing of the action; the will of *William Holliday*, the second, is also relied on.

Do all these circumstances satisfy you and repel the presumption of payment which the law raises? Are the facts first stated inconsistent with this presumption? We shall now refer you to the case of *M'Culloch executor of M'Culloch* v. *Montgomery and wife*. [The court read that case.] On the authority of this case and the pendency and proceedings in the case of *Summerville and wife* v. *Holliday* for the same legacy, the construction of *William Holliday's* will, the pendency of the several ejectments, the records which have been read, the plaintiff's counsel contend we should instruct you it is rebutted and repudiated in point of law. This instruction we do not give. We leave it to you to determine upon this evidence, whether the usual presumption arising from length of time is not rebutted by the circumstances of these ejectments—the suit for the legacy, the report of the auditors, and all the other facts proved in the case.

2. The defendant further requests us to instruct you, "that the circumstances given in evidence in this suit do not rebut the presumption of law, that this legacy is satisfied and paid."

3. And further, "that where there are a variety of circumstances given in evidence to rebut the presumption of payment, it is a matter of fact, which the jury must decide, whether the circumstances given in evidence do rebut the presumption or not."

These points are already fully answered. We do not instruct you as requested on point No. 2. We leave it to you to determine whether the circumstances rebut the presumption. The last point is answer-

ed. We have left it to you whether the circumstances given in evidence rebut the presumption.

4. We are further requested to state to you, "that *Thomas Jackson*, the real plaintiff in this suit, cannot recover the legacy for which this suit was brought, as he has accepted a deed from *William Holliday*, the present defendant, for part of the land out of which this legacy is to be paid, and has accepted a warrant against all claims under the will of *William Holliday*, the elder."

We do not instruct you as required, we direct you that the acceptance of a deed for a part of the land out of which this legacy is to be paid, nor the warranty against all claims under the will of *William Holliday*, will not prevent a recovery.

If you find for the plaintiff, the next inquiry will be how much? We instruct you that only one-third of the legacy can be recovered, that from this in the first instance the one-third of the 24 pounds 5 shillings is to be deducted with one year's interest thereon, that is, 8 pounds 1 shilling and 6 2-3 pence is to be deducted.

We further instruct you that so far as the defendant or his ancestor was out of possession of the premises devised, you may deduct interest *pro rato* for that amount and for that time; and if you are satisfied that the evidence given by the plaintiff repels the presumption from lapse of time, after making these deductions, you will find the balance for the plaintiff.

Errors assigned.

1. That the court below erred in receiving the testimony offered by defendant, mentioned in the first bill of exceptions, for the purpose therein mentioned.

2. That the court erred in receiving the testimony offered by defendant, mentioned in the plaintiff's second bill of exceptions, for the purpose therein mentioned.

3. That the court below erred *in refusing to instruct the jury*, as requested and contended for by the plaintiff below and plaintiff in error, "that the pendency and proceedings of the case of *Summerville and wife* v. *Holliday*, for this same legacy, (the record of which was given in evidence by plaintiff) the construction of *William Holliday's*, the pendency of the several ejectments the records of which have been read in this case, rebutted and repudiated, *in point of law*, any presumption of payment which the law raises from the lapse of twenty years from the time this legacy became payable, until this suit was brought for recovery of the same," and in leaving the effect of the same in point of law to be determined by the jury.

4. That the court below erred in their answers to the *first*, *second* and *third* points of the defendants below.

5. That the court erred in charging the jury; that only one-third of the legacy (of 300 pounds) could be recovered by the plaintiffs in this case, subject to a deduction of one-third of 24 pounds 5 shillings.

6. That the court erred in instructing the jury, that so far as *William Holliday* (the third) or his ancestor, were out of possession

of the premises devised, they might deduct interest on the legacy *pro rata*, for that amount and for that time.

7. That the court below erred in saying, that the presumption of law of the payment of money, after the lapse of twenty years from the time it became payable, applies to the case of a legacy, unless rebutted.

Bell and *Potter*, for plaintiff in error, cited, 7 *Serg. & Rawle* 17; 4 *Cranch* 420; 5 *Johns. Rep.* 417; 14 *Serg. & Rawle* 22; 10 *Johns. Rep.* 417; 3 *Binn.* 337; 1 *Johns. Chan.* 316; 1 *Coxe* 535; 2 *Ves.* 43; 1 *P. Wms* 742; 3 *P. Wms* 287.

Miles, contra, cited, 1 *Penns. Rep.* 419, 148; 14 *Serg. & Rawle* 19; 17 *Serg. & Rawle* 353; 13 *Serg. & Rawle* 124.

The opinion of the Court was delivered by

Ross, J.—In this case seven errors have been assigned. I shall however confine myself to an examination of those three alleged to be in the charge of the court, as they only seem to be of any importance.

The third, fourth, and seventh errors, embracing in effect the same questions, will be considered together. It was contended in the court below that the legacy for which the suit was brought, having become due in 1798, and the present suit not having been instituted until August term 1832, the presumption of law was that the legacy had been paid or released; and consequently that no recovery could be had by the plaintiff. The court in this charge instructed the jury, that from the lapse of time, the presumption was that the legacy had been paid, unless there were such circumstances given in evidence, which would repel that presumption. In this opinion, there certainly was no error. After a lapse of twenty years, without any demand being made, or any measures taken to collect, or any thing paid on account thereof, a legacy will be presumed to have been paid; and a court should so instruct the jury, unless the laches or delay should be accounted for in some manner consistently with the existence of the legacy—or in other words, unless there be evidence sufficient to repel the presumption of law. There is no statutory provision limiting the time within which a legacy shall be demanded or sued for; or within what time it shall be barred or presumed to have been paid. It rests, however upon the same principles, which govern the cases of bonds, mortgages and judgments; and there surely is nothing in the nature or character of the demand, which should exempt it from the same rule of decision. The rule respecting the presumption of payment from the lapse of time is in the nature of the statute of limitations, and is derived by analogy from the English statute concerning writs of entry into lands. In the case of *Arden* v. *Arden*, 1 *Johns. Ch. Rep.* 316, it is said, "there is no legal bar by force of the statute of limitations to a legacy. It cannot be pleaded; but still the court, justly averse to giving counte-

nance to any stale demands, adopts the provisions of the statute as a guide in the exercise of its discretion." In *Durdon* v. *Gaskill*, 2 *Yeates* 368, it was held, that after a length of time, payment of a legacy would be presumed; though such presumption might be rebutted by other circumstances. And it is also clear from the decisions in the cases of *Parker* v. *Ash*, 1 *Vern.* 256, and *Higgins* v. *Crawford*, 2 *Ves. Jun.* 571, that length of time will raise a presumption of a legacy having been paid; and that such presumption, unless repelled by evidence of particular circumstances, will be conclusive. The case of *Kane* v. *Bloodgood*, 7 *Johns. Ch. Rep.* 90, which overrules the case of *Decouche* v. *Savetier* in 3 *Johns.* 190, may also be referred to as an authority. In that case, it is said, that since a remedy at law is given by statute to recover legacies or distributive shares, the statute of limitations would be a bar to a suit for a legacy in equity, as well as at law. In *Cope* v. *Humphreys*, 14 *Serg. & Rawle* 20, Justice *Duncan* says, "that twenty years is the fixed limitation as to *all debts*, with the exception of trusts, which depend on other principles." And I may add, that only such trusts as are not at all cognizable at law would be embraced within the exception. A legacy is not such a trust; and there can be no doubt therefore of its being barred by lapse of time. The rule presuming the payment of debts is founded upon policy and the welfare and safety of the party. The law will not encourage the laches of a plaintiff, but will interpose a shield to protect the defendant against stale demands, after the lapse of twenty years. If it will protect him from the payment of a judgment after the lapse of twenty years, I can see no reason, as I have already said, why a legacy should not also be presumed paid after a lapse of twenty years from the time it became due, in the absence of any proof to rebut the presumption of payment. See *Laussat's Edit.* of *Fonblanque's Equity* 330.

The presumption of law that a debt has been paid, or a right of way has been granted, or a bond, a mortgage or legacy satisfied, are those deductions from the existence of a fact, to which a legal effect is attached beyond their nature and operation. They are either conclusive, and may be made by the court; or they are inconclusive, and can only be found by a jury. 2 *Saund. Rep.* 728, 175; 4 *Burr.* 2225; *Stark. Ev.* 1240, 1245. Hence I conclude, that it is not so much a presumption that the money has been paid, or a right of way granted, as it is the *substitution of an artificial rule* in the place of evidence and belief, after a delay which may have been destructive of the evidence on which a belief might be justly founded.

It has been further contended, that the rebutting evidence which was given in this case upon the trial was sufficient to repel any presumption of law arising from the lapse of time; and that the court below should have so instructed the jury. Proof rebutting the presumption may be derived from a single fact, or it may consist of a variety of circumstances connected with the situation of the parties, or the subject matter under consideration. Where the presump-

tion from the lapse of time is not repelled by some circumstances accounting for the delay, it is the duty of the court to instruct the jury, that they are bound by the presumption of law; but where there is some circumstance offered in evidence to account for the delay, it is then the duty of the court to refer it to the jury, as an open question of fact, to determine as to actual payment. These principles were fully recognized in the case of *Cope* v. *Humphreys*, already cited. See also *Phillips's Evid.* 115, 117.

If any of the circumstances which were given in evidence accounted for the delay, it was proper that they should be left to the jury. 4 *Cranch* 420. The case of *M'Culloch* v. *Montgomery*, 7 *Serg. & Rawle*, has been much relied on in this case by the counsel for the plaintiff. This question, however, was not raised in that case. It was not before the court for adjudication; and therefore the expression used by Chief Justice *Tilghman*, *seeming* to admit the right of the court to instruct the jury, that the circumstances proved are sufficient to repel the presumption of payment, is not to be received with that authority for which the counsel contend. This court is only governed by the decision actually made in any case, upon the errors assigned. We are not responsible for the language used, or the reasoning adopted by the judge who delivers the opinion; but simply for the points as argued and decided. The case, therefore, of *M'Culloch* v. *Montgomery* we do not think is decisive of the question. It is true, the court might have given their opinion on the nature and sufficiency of the evidence to repel the presumption; but they were not bound to do so, and neither would the jury have been bound by such opinion. The repelling evidence consisted of a great variety of facts and circumstances, which it was the province of the jury to decide, and to draw such inference from, as would seem to them correct; and therefore I think the court below was justified in submitting the question to the jury, whether or not the evidence offered was sufficient to repel the presumption of payment, after the lapse of twenty years.

As I have before remarked, the court think the other errors have not been sustained, and therefore we direct the judgment to be affirmed.

KENNEDY, J.—Entertaining great respect for the opinion of the majority of this court, and believing that the peace and welfare of the community may depend in some measure upon the degree of confidence with which the decisions of the court of dernier resort in the state may be received, and that that confidence may be increased by the unanimity attending those decisions as well as by the reasons advanced in support of them; it is with unfeigned reluctance, as well as diffidence, that I have ventured upon this occasion to express my dissent. Indeed, nothing could have prompted me to it, but a firm and settled conviction that the decision of the court, in this case, goes to determine, what I consider to be most clearly a

mixed question of law and fact; to be a question exclusively for the jury to decide according to their discretion, without any *legal advice* or *direction* from the court in regard to it.

Mr *Starkie*, in his Treatise on Evidence, part 4, pages 1235 and 1236, in speaking of presumptions and their several natures, says, that which arises from the lapse of a *defined* space of time, is always in its nature *artificial*, and not *natural*; for evidence, when left to its own natural weight, is not confined within arbitrary and artificial boundaries; thus, at the expiration of twenty years, without payment of interest on a bond, or other acknowledgement of its existence, satisfaction is to be presumed; but if a single day less than twenty years has elapsed, the presumption of payment, from mere lapse of time, does not arise. It is then obviously an *artificial* and *arbitrary* distinction; for no man's mind is so constructed, that the mere lapse of the single day, which completes the twenty years, would absolutely generate in it a conviction of belief, that the debt had been satisfied. So far, then, as it is artificial and arbitrary, it is a presumption purely of *law*, because it is established by the law, and from this source it derives all its force and artificial operation and effect, beyond its mere natural tendency to produce a similar effect. This presumption being the creature of the law, it necessarily follows, that it is for the court to say to the jury, on a given state of facts, whether they ought to draw the inference, or to raise the presumption in favour of payment, or not.

And although I admit, that it is the province of the jury to draw or make every presumption of a mixed character, that is, of *law and fact*, as contradistinguished from one merely of *law*, with which the jury have nothing whatever to do, but belongs exclusively to the court; *Stark. Ev. part* 4, *page* 1243; yet, in making presumptions of *law* and *fact*, the jury are required to be *advised* and *directed by the court*; as in the case of an incorporeal hereditament, after an adverse enjoyment of it for the space of twenty years *unanswered*, the court, if requested, is bound to instruct the jury that they ought to presume a grant in favour of the party so enjoying; but if it were to appear from the evidence, that such hereditament, although enjoyed adversely for the twenty years, yet that the right to such enjoyment had been contested during the whole of that time, it would be the duty of the court to direct the jury that no such presumption could be made by them; *Ibid.* 1243, 1244. In *Stœver* v. *Whitman*, 6 *Binn.* 419, it is laid down that *what* circumstances will justify the presumption of a deed or grant is matter of *law*, and that it is the duty of the court to give their opinion, whether the facts, if proved, will justify the presumption. Miserable, indeed, would be the state of society, if it were not a question of law to be decided by the court. Great insecurity and uncertainty would necessarily attend the titles to property, especially that of an incorporeal nature, to which the statute of limitations is not applicable. Legal advice, such as might be relied on, could never be given or obtained; for the question must

be referred to the decision of a jury; to be determined by their feelings, prejudices, or prepossessions, without any legal instruction from the court, and the presumption made, or not made, accordingly as they shall happen to be moved towards the parties litigant. Hence, being to be decided not by any fixed rule or principle of law, but at most by some rude and undigested notions of right and wrong, or ill founded prejudices, if not hatred against one party, or good feeling and affection, from long acquaintance, in favour of the other; or sympathies produced by the circumstances attending the case; in short, by the influence of all those impulses to which the infirmity, and possibly the depravity of human nature are subject: it would be utterly impossible, even for the most experienced and distinguished of the profession, to give any advice, or to foretell what may be the result, where every thing must be decided by the jury, without legal advice and direction from the court.

If we refer to the origin of the rule on this subject, and the authorities under which it has been established, we will see that it is founded rather upon *acquiescence* than delay, and that the courts have uniformly instructed juries, under what circumstances it ought to be allowed.

The doctrine that bonds of many years standing should be presumed to be paid, where the obligees had suffered them to lie dormant, was first established in courts of equity, by their administering relief to the obligors who were sued on them at law. In *Coles* v. *Emerson*, and *Carpenter* v. *Tucker*, 1 *Chan. Rep.* 78, as early as 10 *Car.* 1, 1635, the court of chancery decreed the bonds upon which the complainants in these cases respectively were sued at law, to be delivered up to be cancelled, upon the ground that they must be considered satisfied, inasmuch as twenty-two years had elapsed without any *demand* having been made or *interest* paid thereon. And in *Geofrey* v. *Thorn*, *Ibid.* 88, similar relief was granted for the same reason. See also, *Powell* v. *Godsale*, *Finch* 77, and *Moyle* v. *Lord Roberts*, *Nels.* 9, where the court interposed upon the same ground and gave the like relief. It does not appear, however, that any definite period of time was fixed upon in those early cases, as being sufficient, where the creditor had lain by without making a *demand*, to raise the presumption of payment. But after this, Lord *Hale* appears to have been the first who introduced the principle into the courts of common law, and laid down the rule, that a lapse of twenty years without any *demand* made, or none appearing in the case, was sufficient to raise the presumption of payment. 1 *Term Rep.* 271; 19 *Ves.* 196, 197; *Matthews on Pres. Ev.* 379. In this he was followed by Lord *Holt*, who, in 1702, held, that "where a bond for payment of money has *lain dormant* twenty years, if, in an action brought thereon, the defendant pleads *solvit ad diem*, the plea will be good; for it is a strong presumption the bond has been satisfied, where there has been *no demand* made, nor *action brought thereon* in so long a time." *Anon. Case*, 11 *Mod.* 2. And in *Hothershill* v.

Bows, 6 *Mod.* 22, in the next year, he laid it down, that "if a bond be of twenty years standing and *no demand proved thereon*, or *good cause of so long forbearance shown* upon *solvit ad diem*, he should intend it paid." Afterwards it was recognized in *Moreland* v. *Bennitt*, 1 *Stran.* 652, and in *Searle* v. Lord *Barrington*, 2 *Stran.* 826, *S. C.* 2 *Lord Raym.* 1371. And again, in *Humphreys* v. *Humphreys*, 3 *P. Wms* 396, 397. In 1740, in *Gratwick* v. *Simpson*, 2 *Atk.* 144, it is reported, that "the *judges have laid it down* now as an invariable rule, that if there be *no demand* for money due upon a bond for twenty years, that *they* will *direct* a jury to find it satisfied from the presumption arising from the length of time." Likewise, in *Lemon* v. *Newnham*, 1 *Ves.* 51, the rule is laid down in the following terms, "where *no demand* of principal or interest is made for twenty years, satisfaction will be presumed." And in *Trash* v. *White*, 3 *Bro. Ch. Rep.* 291, Lord *Thurlow* lays it down, that there must not only be nonpayment of interest during the twenty years, to raise the presumption of payment of the principal, but *no demand.* So in the *Winchelsea* causes, 4 *Burr.* 1963, the court say, "bonds which have *lain dormant*, shall be *supposed* to be satisfied, after twenty years." And twenty years *without a demand* being made, was clearly Mr Justice *Buller's* understanding of the rule, as appears from what he has said in *Oswald* v. *Legh*, 1 *Term Rep.* 271.

Now, these authorities all prove most abundantly, that a *voluntary forbearance* or *acquiescence* on the part of the creditor or obligee, is the very *reason* and foundation of the rule; but where there has been a *demand* or a *suit* commenced, no matter whether in proper form or not, so that it be for the same debt, within the twenty years, *acquiescence* is excluded and no presumption arises. But even a demand or suit is not necessary to prevent the rule taking place, where, from the poverty of the debtor, they would prove fruitless. Nor will the presumption arise, where the debtor has been absent and out of the reach of the creditor, or where the creditor himself has been abroad, and from this circumstance no opportunity afforded the debtor of making payment. In *Hillary* v. *Walker*, 12 *Ves.* 266, Lord Chancellor *Erskine*, in speaking of a bond, says, "upon twenty years, the presumption is, that it has been paid; and the presumption will hold unless it can be repelled; unless insolvency or a state approaching it can be shown, or that the party was a near relation, or the absence of the party having a right to the money, or something which repels the presumption, that a man is *always ready to receive his own.*" Lord *Eldon*, also, in *Fladong* v. *Winter*, 19 *Ves.* 200, after recognizing the rule, says, "it may be met by evidence to satisfy a jury that the debtor *had not the opportunity* or the *means* of paying." And the case of *Wynne* v. *Waring*, is mentioned there as having been decided on this latter ground, and that the presumption did not arise, although more than fifty years had passed. So in *The Mayor of Hull* v. *Horner*, *Cowp.* 109, it is said "there is a time when a jury may presume the debt paid, &c., but if a witness is

produced to prove the contrary, as by showing the party not to have been *in circumstances to pay*, or a recent acknowledgement of the debt, the jury *must* say that the debt is not paid." And the opinion of Lord *Ellenborough*, as expressed at *Nisi Prius*, in *Willaume* v. *Gorges*, 1 *Camp.* 217, which seems to contravene these cases so far as *poverty* is made a sufficient excuse for not prosecuting a suit against the debtor, may well be questioned as to its correctness. But in *Newman* v. *Newman*, 1 *Stark. N. P.* 81, this distinguished judge held, that the residence of the defendant in America, prevented the presumption from arising, and most positively directed the jury to this effect, by saying "there was *no ground* for the presumption." As he also directed them in the immediately preceding case with the same degree of positiveness, "that under the circumstances, the inference to be drawn from lapse of time was *not rebutted*, and *directed* the jury to presume that the judgment *had been discharged* by being paid off or released." Thus exercising, as it appears to me, not only an authority which belongs to the court, but discharging a duty which it is bound to perform, by instructing and directing the jury as to the sufficiency of the circumstances attending the lapse of the twenty years to rebut the presumption.

Whether the presumption arises or not, does not then depend upon mere lapse of time, but upon *acquiescence* and other circumstances connected with it; as, for instance, in the case of the enjoyment of an incorporeal right for a space of twenty years, that alone is not sufficient; it must have been *adverse*, *exclusive* and *uninterrupted*, or *acquiesced* in, otherwise the presumption of a grant can not be made. *Strictler* v. *Todd*, 10 *Serg. & Rawle* 68, 69. So in the case of a bond, as appears from the cases and authorities referred to, it must have *lain dormant* without any *demand* made, or *suit* brought, or *interest* paid thereon, or *acknowledgement* of the debt, or *absence* of the party from the country, or *inability* to pay during the period of the twenty years; otherwise the presumption of satisfaction does not arise and the court ought so to instruct and direct the jury. I consider the late Chief Justice as fully supporting this doctrine in *Miller* v. *Beates*, 3 *Serg. & Rawle* 493, when he says, "there is no positive law fixing a presumption of the payment of a bond, and yet if the interest has remained unpaid for twenty years, and there is *no circumstance* accounting for this long cessation of payment, there arises so strong a presumption of the satisfaction of the debt, that the jury not only may, but *ought* to presume it, and unless they do the *court would order a new trial*." And again in *Kingston* v. *Lesley*, 10 *Serg. & Rawle* 389, he says, "where the facts are plain, the judge may with great propriety tell the jury either that they *ought* or *ought not* to make the presumption." And the present Chief Justice lays it down in *Henderson* v. *Lewis*, that "the presumption is not *subject* to the *discretion of the jury*," which is adopted by the late Mr Justice *Duncan*, in *Cope* v. *Humphreys*, 14 *Serg. & Rawle* 21, and is considered by him a presumption of *law*, of which the court must charge the jury;

and that to avoid it when requested, would be error. Beside, in this last case, page 22, the very question, whether the circumstances given in evidence were sufficient or not to prevent the presumption from arising, was discussed and decided on by this court as one of *law:* and the court say the only circumstance of the kind pointed out was, that one of the conusors of the judgment had been defaulted on two *nihils* returned, as to the effect of which in preventing the presumption from arising in favour of the administrators of the conusors who had pleaded to issue, the court below was not requested to give any opinion, but if they had, "*it should have been an opinion* directly against the plaintiff." I also consider the case of *M'Dowell* v. *M'Cullough*, 17 *Serg. & Rawle* 51, as establishing fully all that I contend for—which is, that it must be left to the jury to judge of the *weight*, that is, the *credibility* of the evidence tending to prove the facts or circumstances, relied on by the plaintiff, to rebut the presumption and to account for the delay consistently with non payment of the debt, and to determine whether they have been proved or not; but whether, when found by the jury to exist, they are sufficient in law to rebut the presumption of satisfaction arising from lapse of time, is a question upon which it is the duty of the court, if requested by either party, to give their opinion and instruct the jury. The court of common pleas, in that case, were, among other things, requested by the defendant to instruct the jury, "that the conversations detailed in evidence, if believed by the jury, do amount to such an acknowledgement by the party as the *law requires* to destroy the legal presumption;" upon which the court told the jury, "that they would not say that the conversations detailed in evidence, if believed by the jury, did not amount to such acknowledgement by the party as the law requires to destroy the legal presumption. That that depended upon the *weight* of evidence, of which they were the exclusive judges. That in the *opinion of the court*, whose opinion on facts is not binding on this jury, the conversations detailed in evidence *do amount to such acknowledgement* by the defendant as the *law requires*, to destroy the legal presumption of payment of the single bill." Now although this direction of the common pleas is not expressed with as much precision and perspicuity as it might have been, yet it was considered by this court as a *positive direction* to the jury, that if they *believed* in the truth of the acknowledgement detailed by the witness, that it *did amount to such acknowledgement* by the defendant as the *law required* to destroy the legal presumption of payment; and as such it was approved, and the verdict and judgment thereupon given affirmed by this court: for the late Mr Justice *Duncan*, who delivered the opinion of the court in page 54, says, "the court, with superabundant caution, say, that if the jury *believe* the acknowledgement detailed by the witness, that this *does amount to such acknowledgement* by the defendant, *as the law requires to destroy the legal presumption of payment*, but still instruct them of its *weight*, (not legal effect if believed) they must judge." I am

aware that in *M'Lean* v. *Finley*, 1 *Penns. Rep.* 101, where an action of debt had been brought in the latter end of 1822, upon an administration bond given in March 1797, and the filing of an administration account in the register's office in 1805, was relied on by the plaintiff as being sufficient in law to rebut the presumption of satisfaction from lapse of time, the Chief Justice, who delivered the opinion of the court, said, "the judge who tried the cause very properly left the *effect* of filing the account to the jury, as a *matter purely of fact*;" but it is evident from the whole of the opinion taken altogether, that this court affirmed the judgment of the common pleas, because *they considered* the filing of the account *insufficient in law* to rebut the presumption; and that if the court had given any direction as to the *legal effect* of it, it ought to have been against the plaintiff, who could not, therefore, make it good cause for reversing the judgment, that they had declined doing so but left it to the jury to be decided by them.

This court have decided and have so directed, as matter of *law*, what shall be sufficient to suspend the presumption of payment arising from lapse of time. This was done in *Penrose* v. *King*, 1 *Yeates* 344, one of the first cases, involving the question, that we have reported; and so in the courts of the United States, as well as in the state courts. In *Cottle* v. *Payne*, 3 *Day* 292, the circuit court of the United States charged the jury in the following words: "if twenty years had elapsed since the cause of action accrued, *we think* the circumstances disclosed by the plaintiff are such as to *remove any presumption of payment*." And in *Dunlap* v. *Ball*, 2 *Cranch* 184, 185, the supreme court of the United States reversed the judgment of the circuit court because it instructed the jury that "from the length of time stated in the facts agreed on, the bond in law is presumed satisfied, unless they should find from the evidence that interest was paid on the bond within twenty years from the 5th of September 1775 (the time of the last payment), or that a suit or demand was made on it within twenty years from the last mentioned time;" instead of directing the jury, as the supreme court determined the circuit court ought, "that as twenty years had not elapsed, *exclusive* of the period during which the plaintiffs were under a *legal disability to sue*, before the action was brought, the *presumption of payment did not arise*."

But it has been said, that it is impossible to lay down any general rule by which the circumstances of each particular case, as it arises, can be decided to be sufficient or insufficient to rebut the presumption of payment or to prevent it from arising, and therefore it becomes necessary to refer the matter to the jury to be decided as a question of fact without any instruction from the court. I am not prepared to admit the truth of this proposition to any great extent, and much less the force of it as a reason for referring the question exclusively as a matter of fact to the decision of the jury. The cases already referred to show, as it appears to me, that principles or rules have been laid down and established by the courts, that will apply

to and govern the most of the cases that can arise to raise the question; and if any should occur not falling within the principles already fixed and settled by adjudications on this subject, let the existence of the facts or circumstances of which evidence may be given as attending it, be left to the jury to be decided as a question of fact; but as to their effect in law if found by the jury to exist, whether sufficient or not to prevent the presumption of satisfaction from arising where twenty years have run, it belongs to the court, and it is its duty to instruct the jury; for the rule itself, raising the presumption of payment, being, as has been shown already, partly *artificial*, founded upon principles of policy, and so making it one of purely *legal* character, must therefore, in its application to cases as they shall arise, be directed entirely by the court, who alone can be presumed to be perfectly acquainted with the *reason* and foundation of the rule, and able to tell the jury whether the facts and circumstances, of which evidence may be given if found to exist, will set aside the reason of the rule, and if so that the rule is inapplicable to the case; *cessante ratione, cessat et ipsa lex;* otherwise it will be utterly impossible to preserve consistency and uniformity in the decisions that must be made on this subject, and to prevent it from remaining a question that cannot be solved by settled principles of law, and of necessary consequence an endless source of litigation. Having shown now, I conceive, as well from the reason of the rule as from the authorities by which it has been established, that it belongs to the court and not to the jury, under a given state of facts or circumstances, to direct the application and fitness of it, I come to consider the nature of the plaintiff's claim in this action, and the applicability of the rule to it under the circumstances existing, in connexion with the great length of time that has elapsed since it became payable. It being for a legacy charged upon land devised by the testator, is clearly not within our act of limitations, but may, I think, be considered obnoxious to the presumption of payment after a great length of time, without being demanded by the legatee, or attended with other circumstances showing that it has not been paid, as will appear from the following cases. *Fotherby* v. *Hartridge*, 2 *Vern.* 21; *Cusse* v. *Ash*, *Finch* 316; *Jones* v. *Turberville*, 2 *Ves. Jun.* 12, and *Lewis* v. *Lord Teynham*, cited therein, *Ibid.* 13; 4 *Bro. Ch. Rep.* 116; 2 *Ves. Jun.* 280, *per Lord Alvanley*; *Arden* v. *Arden*, 1 *Johns. Ch. Rep.* 313; *Kane* v. *Bloodgood*, 7 *Johns. Ch. Rep.* 90; *Winstanley* v. *Savage*, 2 *M'Cord's Ch. Rep.* 437.

The same principles of policy and convenience in connexion with the motives which usually govern men in their dealings and intercourse with each other, and which gave birth to the rule that in its operation extinguishes bonds, judgments and mortgages after a lapse of twenty years, seem to make it equally necessary as well as applicable for the like purpose to the cases of legacies charged upon real estate. I therefore think if twenty years be suffered to pass by after the legacy has become payable without any steps being taken to enforce

the payment of it, and the delay unaccounted for consistently with non payment, it ought to be considered *prima facie* evidence of payment, and that the court, upon the trial of the action brought afterwards to recover it, ought so to instruct and direct the jury.

Believing that the case of *M'Cullough* v. *Montgomery*, 7 *Serg. & Rawle* 17, could not be easily distinguished from the present in principle; I purposely omitted bringing it into view until now, that I might the more fully compare the one with the other. That was an action of debt upon a penal bill dated 14th October 1779, given by *George M'Cullough* to *Jane Montgomery* one of the plaintiffs (then *Jane Grubb*), in the penalty of 300 pounds, conditioned for the payment to the said *Jane* of her legacy as mentioned in her father's will, to the full satisfaction of her mother the widow *Grubb;* immediately after giving this bill *M'Cullough* married the widow, who was sole executrix of *Thomas Grubb* the testator's will. By it 150 pounds, besides some articles of property, were bequeathed to *Jane* his daughter, the plaintiff, when she came to the age of eighteen years, which would not be until August 1783. It does not appear from the report of the case when that action was commenced, but it was not until after 1806, when more than twenty-three years had run from the time that the legacy became payable and the bond forfeited. During this interim however, to June term 1798 of Montgomery county court of common pleas, about fifteen years after the legacy had become payable, the legatee brought her first action for the recovery of it against *George M'Cullough* and his wife executrix of *Thomas Grubb* deceased, the testator, which was abated afterwards by her intermarriage with *David Montgomery;* when he brought another action in their joint names to recover the legacy against the same in the same court to August term 1806. Pending this last suit *George M'Cullough* died, and the plaintiffs sued out a writ of *scire facias* against his executor to make him a party to it. The records of these suits and proceedings had therein, after being objected to by the defendant's counsel, were all given in evidence by the plaintiffs, to rebut the presumption of payment which was claimed by the defendant to have arisen from lapse of time. After the evidence was closed on the trial, the court, among other matters, were requested by the defendant, "to charge the jury that the bond sued upon in that cause, ought to be presumed satisfied by the jury *under the evidence given;* and that there was *no evidence* to impugn the legal presumption that the bond was satisfied from its age." In reply to this, the president judge of the court told the jury, that "the *suits for the legacy,* being instituted against the person who was also the obligor in the bond, would have the same effect as a suit for the amount of the bond given for the payment of the legacy; and *take the case out of the presumption* which the law would otherwise raise in consequence of the lapse of time. But it is for you to decide upon the facts. If you are of opinion that there is no evidence in this case to impugn the legal presumption that the bond is satisfied from its age,

your verdict will be in favour of the defendant. But if you are of opinion that the legal presumption of payment is repelled by the evidence, your verdict ought to be in favour of the plaintiffs for the amount of the legacy." Upon this charge to the jury, this court gave the following opinion delivered by the late Chief Justice. "In general, where a debt is due on a bond, and twenty years elapse, without any payment of principal or interest or any *demand* of payment by the obligee, it must be presumed that the debt is paid, because it is contrary to the usual course of human affairs, that a creditor should *acquiesce* so long without receiving satisfaction. But the presumption ceases when it appears that the creditor has *not acquiesced*, but endeavoured to obtain payment. Now in the first place, although this penal bill bears date in October 1779, yet the legacy secured by it was not payable till the 8th of August 1783, when *Jane Grubb* the legatee arrived at the age of eighteen years. Counting from that period, it appears, that after the expiration of only fifteen years *Jane Grubb* commenced an action of debt against *George M'Cullough* and his wife for the recovery of her legacy. This suit was brought to February term 1798, and abated by the plaintiff's marriage with her present husband *David Montgomery*. The action was renewed by the present plaintiffs against *George M'Cullough* and his wife to August term 1806; and from that time to the present moment, the plaintiffs have been endeavouring to obtain payment of the legacy, either by an action of debt in which the legacy was demanded, or by an action on the penal bill of *George M'Cullough*. It is *immaterial which form* of action was used, for in either the *recovery of the legacy* was the *object of the suit*. When the president of the court of common pleas left it to the jury, to determine upon this evidence, whether the usual presumption arising from length of time was not rebutted by the circumstances of the case, he charged *more favourably* to the defendant than he *had any right to expect*, for the charge might very properly have been, that taking all things into consideration *no presumption of payment arose*." Here then it is expressly ruled, where a bond was given to secure the payment of a legacy not charged upon land, that an action of debt commenced against the executrix of the will of the testator for the legacy and not on the bond, fifteen years after the legacy and the bond became payable, which being terminated ineffectually by the plaintiff's own act in getting married, she and her husband commenced a new action in their joint names against the executrix of the testator for the legacy, but still not on the bond, twenty-three years after it became payable ; prevented the presumption from arising, in an action brought afterwards on the bond itself against the obligor, that it was paid. This decision is not only in perfect accordance with the true spirit and reason of the rule, but sustained by all the authorities that have been mentioned, as it appears to me, on the subject. The rule is founded upon *acquiescence*, and without this for the space of twenty years there can be no presumption raised

of payment. Endeavouring to recover the money, whether by a proper or improper course of proceeding, within the period of twenty years, negatives *acquiescence*, and of course there can be no presumption. Who then could have doubted after this decision, that this court would not have held it error in the court below, when requested *by the plaintiff* to charge the jury in conformity to the principles of it, not only to refuse to do so, but to submit the question expressly to the jury, to be decided by them according to their notions, whatever they might be? I must confess for myself, that I could not have expected it. The president judge, in this case, with the case of *M'Cullough* v. *Montgomery* in hand, and after reading it to the jury, says to them, "on the authority of it the plaintiff's counsel contend, we should instruct you that the presumption of payment is rebutted, and repudiated in point of law. *This instruction we do not give. We leave it to you to determine this* from the evidence, whether the usual presumption arising from length of time is not rebutted by the circumstances of these ejectments, the *suit for the legacy*, the report of the auditors, and all the other facts proved in the cause." Now all this appears to me to be in direct contradiction to the letter and spirit of the decision in *M'Cullough* v. *Montgomery*, as well as every analogous principle of law. If there be any difference between that case and the one before us, it is that there is less room, if possible, left for the presumption to arise in the latter than in the former. The first was before this court in 1821, thirty-eight years after the bond became payable, without any demand being made of the debt until fifteen years after it fell due, when a suit was commenced, not on the bond, but for the legacy against the executrix of the testator, against whom an action of debt is given for the recovery of it by our act of assembly, but was abated by a voluntary act of the plaintiff herself, who however renewed it immediately, and the claim kept alive thus by a succession of suits, which may, for aught we know, be still pending and undetermined. In the present case the legacy was payable in 1798, thirty-five years ago, and a suit brought for the recovery of it in two years afterwards against the devisee of the land upon which it was charged, the only person then in being who was bound to pay it. This suit was pending till 1832, when it was brought on to trial and decided against the plaintiff, because the executors of the testator had not been made defendants with the devisee of the land, that the interest of the creditors of the testator's estate, if there were any, might be protected. *Holliday* v. *Summerville*, 3 *Penns. Rep.* 533. This action *continuing*, the claim was then brought, immediately after the termination of the first to the next term in the same court, and thus the *demand* for the legacy has been *continued* and *kept alive* without ceasing by actions in immediate succession without the least intermission, which is the most efficacious manner known to the law of doing it, in order to repel all presumption of a discharge.

In the case before us, the delay in not bringing the first suit to

trial before 1832, is fully accounted for, as I shall show in the sequel, by the report of the auditors; while the delay in not bringing the first suit commenced in the case of Mrs *Montgomery* in 1798, to trial before 1806, after a lapse of eight years, when it abated by a voluntary act of her own, and again, in not bringing the new suit commenced, upon her marriage in 1806, by her and her husband to trial before 1821, after a further delay of fifteen years more, is unaccounted for. This may serve to show, that so far as vigilance in the prosecution of suits commenced has any tendency to rebut the presumption of payment, it is, as respects these two cases, in favour of the one under consideration. But it seems clear to me, from the case of *M'Cullough* v. *Montgomery*, that this court held and adjudged the *pendency* of the actions, whether brought in proper form or not, so that they were for the *same* debt or *claim*, to be sufficient in law to prevent the presumption of satisfaction from arising; no matter what length of time was suffered to intervene between the commencement of the first action and the trial of it, or of the second or last, provided the first were commenced within the period of twenty years after the debt became payable, and the second *immediately* upon the termination of the first, without its being tried on the merits. This appears also to be in perfect accordance with the reason and foundation of the rule, which takes place only where there is *acquiescence* on the part of the creditor, but which is completely excluded by his commencing suit within the twenty years, and persisting in the *renewal* of it, and keeping it *pending* until he can have a trial on the merits.

It is also supported by the opinions and decisions of not only the highest and most respectable judicial characters, but of courts of *dernier* resort. In *Gifford* v. *Hort*, 1 *Sch. & Lef.* 386, it was held by Lord Chancellor *Redesdale*, that a lapse of forty years, during which period a suit was pending, and not abated, but remaining in such a situation that the defendant might at any time have applied to dismiss the bill if he had thought fit, would neither raise a presumption in favour of the defendant, nor yet furnish ground to impute laches to the plaintiff. The bill referred to in that case, which had been pending so long, was commenced in 1763, by a mortgagor, for the redemption of the mortgaged premises against the mortgagee, who had taken possession of them twelve years before that. The bill was amended in 1764, without any further proceeding being had on it till 1799, a space of thirty-five years, when the first complainant having died in the interim, a bill of revivor was filed by the person next in interest, which, after issue joined between the parties, was, upon hearing, dismissed, in March 1802. Immediately after this dismissal of the bill of revivor the complainant therein died, and a bill of revivor was filed by the person next entitled to the estate, under the limitations contained in a deed of settlement, praying in like manner as the former bills did, that upon payment of what should appear to be justly due on the mortgage, the mortgaged

premises might be reconveyed discharged thereof. This was the bill upon which a hearing was had before Lord *Redesdale*; and from the facts of the case, it would appear that the mortgagee had been in the possession of the mortgaged premises upwards of fifty years, but with the exception of the first twelve years, bills with very short intervals for the redemption of the estate had been pending, yet Lord *Redesdale* said, "very little difficulty on the ground of the *lapse of time* would strike my mind in making this decree," although the mortgagee had been in possession of the mortgaged estate nearly three times as long as it would have been necessary to have rendered his estate absolute had his possession been *acquiesced* in. And in *Cane* v. *Allen*, 2 *Dow's P. Ca.* 289; where a suit had proceeded as far as bill, answer and replication, but after that, no further steps were taken in the cause for upwards of twenty years; the house of lords adjudged that this alone was not enough to warrant their lordships in refusing a specific performance, there being *acquiescence on both sides.* Also, in *Moore* v. *Blake*, 4 *Dow's P. Ca.* 230; the house of lords held, that if a bill be filed *in due time, delay in prosecuting the suit* will not bar the plaintiff of relief, and reversed the decree of Lord *Manners*, who had dismissed the bill of the plaintiff, a mortgagor, for redemption; because, although having filed his bill in 1782, in due time, yet he had done nothing more in it till 1801, when he filed an amended bill for the revival of the first, which he brought to trial in 1808, when it was dismissed, as has been stated, by Lord *Manners*, for the delay, and is reported in 1 *Ball & Beat.* 62.

Keeping these principles in view, let us see when the first suit was commenced for the legacy in question, and how it has been continued and renewed, and the claim for it persisted in from that time down to the present. Although thirty-four years had run from the time that it became payable, before this action was commenced to recover it, yet in less than two years after it became payable, a suit was commenced by the plaintiff and her husband *James Summerville*, then living, but since dead, to August term 1800, in the court of common pleas of Huntingdon county, against *William Holliday*, the devisee and terre tenant of the land, charged with the payment of the legacy, to recover one-third thereof, which they considered their aliquot proportion of it. On the 17th of January 1804, that suit, by agreement of the parties, was referred to five arbitrators, and continued under this rule of reference until the 22d of January 1805, when three of them made a report to the court, which was filed, setting forth, that after examining the cause at some length, they were of opinion that a final decision of it could not then be made, without doing injustice to the parties, as ejectments were then pending for the recovery of a great part, if not all the land upon which the legacy was charged, and therefore they had come to the conclusion, that no just determination could be made of the suit for the legacy, until decisions were had in the actions of ejectment, referring to them by the names of the respective parties therein, to wit:

The Lessee of Henry Drinker v. *Holliday*, and *The Lessee of E. Nicholas* and *J. Nicholas*, severally against the same. The suit by *Drinker's Lessee* was not determined until October 1811, when it was decided in favour of *William Holliday*, the devisee; and the last of the suits with the *Nicholas's* not until the year 1831, when it was settled by a compromise between the person claiming under the *Nicholas* title, and *William Holliday*, the defendant in this action, claiming the land under the title of *William Holliday*, the devisee, who died in 1819, leaving it to him by will. Immediately after these actions of ejectment were thus settled, *William Holliday*, the defendant in this action, being in the possession of the land by a devise of it to him under the will of the first devisee, was, by a writ of *scire facias* sued out by the plaintiffs in the first action for the legacy, made a party to it in place of the first devisee, then dead. On the 12th of March 1832, that action was brought to trial, and the court, in conformity to a decision of this court, held that it could not be supported, because the personal representatives of the first testator were not made co-defendants in it.

The commencement of the action for the legacy in 1800, against *William Holliday*, the first devisee of the land, charged with the payment of it, and the circumstances attending the pendency of it, down to its termination, are sufficient in law, without doubt, to prevent or rebut the presumption of payment before this last period. It has ever been held, as we have seen from the cases cited, that a suit commenced within the twenty years to recover the debt or claim, and a prosecution of it *without any unaccountable delay*, are sufficient for this purpose. When I say without any *unaccountable delay*, I think that I am conceding what the authorities on the subject do not seem to require and at least as much as in reason can be demanded by the most rigid advocate of the rule; but still, even with this qualification, that a suit or suits commenced shall be prosecuted "without any unreasonable delay," I think I shall show most clearly, that the lapse of time when that first suit was tried in March 1832, could not have defeated the plaintiff's recovery of the legacy in question. It was pending, it is true, a long time beyond what is usual in some, and I would fain hope, in all of the counties of the state; but this delay appears to be satisfactorily accounted for by the report of the arbitrators, who thought, that if the devisee of the land should lose any portion of it in the actions of ejectment then pending against him for it, that there ought to be a proportional abatement of the legacy, and therefore reported as they did, that the suit for the legacy could not be justly and finally decided, until the contest about the devisee's title to the land ended. This report, although not binding upon the parties, and perhaps, at most, could only be regarded as a strong recommendation coming from judges of their own choosing, to delay pressing the suit or claim for the legacy, until the title to the land should be settled; yet it seems to have had in it something so reasonable, equitable and just, that I am

inclined to think, that the plaintiffs in that action would have been censurable if they had not acquiesced in it. *Both parties*, however, *acquiesced*, and the plaintiffs forbore the further prosecution of their suit for the legacy, but not a moment longer than until the actions of ejectment were all settled, by which it is said, about one-sixth of the land was lost by *Holliday*. This delay then being perfectly consistent with the non payment of the legacy, and being, as I conceive, for reasons too, that ought not to be overlooked in the administration of justice, in order that a more just and equitable decision might be made in regard to the legacy, whether the whole or only a proportion of it should be paid; ought, instead of being looked upon as a circumstance that could prejudice the plaintiff's claim, to be considered as operating greatly in her favour; and goes to show most clearly that the delay in prosecuting the action did not take place because the legacy was satisfied or discharged in any way, but because the amount that ought in equity and justice to be paid, could not be ascertained until it should be known first, how much of the land charged with the payment of it, which formed the considera tion for the devisee's paying, could be held by the devisee of it under the testator's title. The plaintiff's delay then being for a *reasonable cause*, ought not, therefore, as Lord Chief Baron *Eyre* said, in *Toplis* v. *Baker*, 2 *Cox* 123, to be *turned against her*. It may be well considered in effect, as if an agreement had been made between the parties, that the trial of the suit for the legacy and the payment of it, should be deferred until it was decided how far the title which the testator had for the land was good, and how much of it his devisee should be able to hold under that title. Now, it cannot be pretended that lapse of time, however great, though it were a century, will raise the slightest presumption of payment before the debt by the terms of the obligation has become payable, or as long as, by the agreement of the parties, it can be shown that it has been postponed. It is only after the time for payment, either by the original terms of the obligation or the subsequent agreement of the parties, has arrived, that the twenty years commence running; for until that, delay cannot become irreconcilable or inconsistent with non payment. The report of the arbitrators and its *reasonable influence* upon the parties, who appear both to have acquiesced in it, therefore, not only accounts fully and satisfactorily for the delay that took place, in not bringing the first action for the legacy to a trial at an earlier day, but most powerfully rebuts all presumption of the legacy having been satisfied in any way, and the court below ought, as it appears to me, to have so instructed the jury.

If, then, the presumption of payment did not arise and could not have availed any thing in this first suit thus delayed and tried in March 1832, as I think I have shown that it could not, I am unable to perceive upon what principle it is, that it can be interposed in this action, which was commenced to the next succeeding term of the court, and as early as it was possible after the termination of the first.

The first, it must be observed, was decided in favour of the defendant, not upon the ground that the legacy had been satisfied, but upon a technical objection that the executors of the testator had not been made parties, as well as the devisee of the land, to the suit, so that the interest of the creditors of the estate of the testators might be protected. This objection was taken and sustained upon the authority of a decision of this court settling the manner in which actions for the recovery of legacies, charged upon land, should be brought and prosecuted, made long after that suit had been commenced; and indeed but a short time before the trial of it came on. And it would seem to me that this court is bound not to permit any rule, which it may have established, to defeat a party of his right, because that he happened to commence his action in a different form or manner from that subsequently settled on by the court. The first action was brought against the party to whom the land was devised, provided he would pay the legacy. It must be admitted by all that he was the only person who had any interest in discharging it, and if he did not do it, it was scarcely within the range of possibility, much less of presumption, that any body else would; hence, the circumstance of his, or that of his devisee, taking advantage of the technical objection to the manner in which the suit was brought, in order to get clear of it, if it is to weigh any thing in this case, that it was decided in favour of the defendant, goes to show that payment or satisfaction of the legacy had never been made, otherwise it would have been made the ground of defence instead of an objection that was purely technical, after a lapse of so many years from the death of the testator, when the claims of creditors could not have existed without being known, by suits having been commenced for them. Seeing then that the first action was thus terminated against the plaintiff, without any default on her part, and the present one thereupon commenced immediately, it ought to be considered a continuation of the first by *journey's* accounts, or at least of the demand of the legacy by suit, which is sufficient to exclude the presumption of payment arising from lapse of time, as the claim for it was not suffered to lie *dormant*, nor *acquiesced* in by the plaintiff. *Spencer's case*, 6 *Co.* 10, 11; *Dalison* 3. And to this effect the court ought to have instructed the jury. But such direction it refused, positively, to give; and instead thereof, directed the jury that they must not only decide upon the *existence* of all these circumstances, but likewise upon their sufficiency in law to rebut the presumption of payment. Thus leaving it to the jury to decide a mixed question of law and fact, according to their own notions, without any further direction from the court in regard to it. This doctrine appears to me to be pregnant with inconceivable mischief, and utterly repugnant to every principle of law on the subject; and, therefore, erroneous, and such as I can not accede to.

It is said that some fifty or sixty acres of the land charged with the legacy were recovered from the devisee, or those claiming under

him; if so, under the view which I have taken of the case, I think that the court below ought also to have instructed the jury that it was their duty to make a corresponding abatement in the amount of the legacy or sum to be recovered, in order to carry into effect what might fairly be considered was the intention of the testator, which was, that his estate should be distributed among his children in certain proportions; and what would seem also to have been thought right by the parties litigant, from their having acquiesced in the report or recommendation of the three arbitrators.

I also think the court below was wrong in directing the jury that only one-third of the legacy could be recovered; for the 300 pounds, the whole amount of it, are given to the plaintiff *Ruth Summerville*, her brother *John* and sister *Mary* jointly; there are no words of severalty connected with it. If the amount had been given to them to be divided among them *equally*, or any similar term or form of expression had been used by the testator, indicating his intention to give to each of them an equal divided third part of the 300 pounds, then the court would have been right; but when he has not done so, the court is bound to construe the bequest according to the common meaning and import of the terms employed; and can not supply words of *severalty*, upon mere conjecture that such would have met the approbation of the testator had they been suggested to him. The distinction between the terms necessary to constitute a joint and several bequest is too well known and established to require illustration; and if the words used by the testator in this case do not make the bequest of the 300 pounds to *John*, *Ruth* and *Mary* joint, I must confess that it would be difficult to conceive any other form or use of terms by which it might be done, unless the word "joint" or "jointly" be introduced, which never has been alleged to be indispensably necessary for such purpose. The bequest then being joint, and *John* and *Mary* being both dead before the commencement of this action, the right to sue for the whole legally survived to *Ruth* the plaintiff, and she would therefore be entitled to recover more than the one-third of the whole amount of it, unless the other remaining two-thirds were paid or satisfied in some way to *John* and *Mary* or released by them in their life times. But still, notwithstanding the court erred in this point, I think it would have been their duty to have charged the jury that, as *John* and *Mary* were both living when *James Summerville* and his wife brought their suit in 1800, and not having joined in it, nor yet having brought any other suit to recover their proportions of the legacy, it ought, from the lapse of time and the acquiescence on the parts of *John* and *Mary*, to be presumed that they were paid or had released their respective proportions. Indeed there was some slight evidence given by the plaintiff herself that *John* had relinquished his claim to it in favour of *William Holliday* the first devisee. It is true that this latter part of the direction which it would have been proper to have given to the jury on this point would have neutralized the first part of it, so as to have pro-

duced the same result with the charge actually given, that is, that not more than one-third of the whole amount of the legacy could be recovered in this action. But still it is important to observe and attend to the lines of demarcation as laid down by the law, in order to avoid confusion and uncertainty.

For the first error which I have noticed and discussed, I think the judgment of the common pleas ought to be reversed and the cause sent back for another trial under a proper direction to the jury.

Judgment affirmed.

Silvergood *against* Storrick.

Upon the reversal of a judgment of a justice of the peace upon a *certiorari*, the award of execution for the costs is as much a part of the judgment as the reversal itself.

The judgment of the court of common pleas upon a *certiorari* is final, whether as regards reversal, costs, execution or any other matter; and the supreme court will take no cognizance of it.

ERROR to *Northumberland* county.

James Silvergood and *William Silvergood*, defendants, obtained a judgment in their favour against *Lewis Storrick* and *John Huggins*, plaintiffs, before a justice of the peace; the judgment was removed into the common pleas by *certiorari*, and reversed. *Storrick* and *Huggins* issued an execution out of the common pleas, for the costs which accrued before the justice and in court. The court below refused to set aside the execution, and this writ of error was sued out, and these errors assigned.

1. The court below should have set aside the execution as to the costs which accrued before the justice.

2. The executions are for costs, in favour of a plaintiff who reversed his own proceeding.

3. There was no judgment to support an execution.

Donnel, for plaintiff in error, cited, 5 *Bin.* 204; 4 *Serg. & Rawle* 196; 3 *Penns. Rep.*

Packer, contra.

Per Curiam.—The award of execution for the costs is as much a part of the judgment of reversal as is the reversal itself; and so inseparably is it connected with the execution which followed, that neither could be reversed without the other. The ground taken in support of the writ is, that there was *no* award of execution, the

judgment entered by the usual short memorandum being, in contemplation of law, what it would, if reduced to form, appear to be in fact; consequently, if the costs are not allowable, there would be no special award of execution for them. The court below, however, who could best judge of the meaning of its entry, thought there was such an award, else the execution would have been set aside on the rule to show cause. But the twenty-second section of the act of 1810, which declares, that "the judgment of the court of common pleas shall be final on all proceedings removed as aforesaid by the said court, and no writ of error shall issue thereon," is applicable to every judgment or proceeding of that court on writs of *certiorari* in the cases intended, whether as regards reversal, costs, execution, or any other matter. In *Welker* v. *Welker*, 3 *Penns. Rep.* 21, which mightbe thought irreconcilable to this, the *scire facias* which was the subject of error was an original proceeding in the common pleas, and might have presented an issue for the determination of a jury. Here, however, the matter is clearly not within our jurisdiction, and we cannot take cognizance of it.

Writ of error quashed *quia improvide.*

Coxe *against* Blanden.

Same *against* Post.

In ejectment, a third person cannot object to the title of the plaintiff, founded on a conveyance of the legal estate by a trustee, on the ground of its having been an abuse of the trust.

A treasurer's sale for taxes of part of a tract of land; and a conveyance of that part, designating the quantity, but not the locality, is good; and an unrestricted choice of locality to the purchaser, is a necessary incident of the sale, and a consequence of a reasonable interpretation of the statute.

APPEAL from the circuit court of *Susquehanna* county, held by Justice *Rogers.*

These were actions of ejectment by *Charles S. Coxe* against *Jonas Blanden* and others, and against *Isaac Post;* in each of which the same questions arose.

The plaintiff, to maintain the issue on his part, gave in evidence: 28th August 1787, warrant to *Isaac Jones* for four hundred acres of land; 1st November 1787, survey of four hundred and thirty-seven acres and two hundred and seventy-one perches and allowance; 1st December 1788, deed poll, *Isaac Jones* to *Tench Coxe;* 20th March 1801, deed, *Tench Coxe* to *William Tilghman, Abraham Kintzing, Jun. P. S. Duponceau* and *G. Worrell,* in trust for certain purposes. And

then offered, 17th April 1803, deed, *George Worrell* to *P. S. Duponceau;* 9th March 1822, deed, *Abraham Kintzing, Jun.* to *P. S. Duponceau;* 1st September 1823, *William Tilghman* to *P. S. Duponceau;* 9th June 1828, deed, *P. S. Duponceau* to *Charles S. Coxe* the plaintiff. To this evidence the defendant's counsel objected, on the ground that the conveyances by the three trustees to the fourth and by him to the plaintiff, were in violation of the trust. The court overruled the objection, and the defendant excepted. The defendant then, to maintain the issue on his part, gave in evidence an assessment of taxes upon this tract of land, four hundred and thirty-seven acres, in the name of *Isaac Jones*, for the years 1813, 1814 and 1815, and a sale by the treasurer of the county, on the 15th of June 1816, of three hundred and eighteen acres of the tract, to *Isaac Post* the defendant, for a sum sufficient to pay the taxes and costs. The deed conveyed to *Post* the three hundred and eighteen acres, but did not describe any particular part of the tract. From these facts two questions arose. 1. Whether the defendant could take advantage of the violation of the trust, in the conveyances given in evidence, if such violation had occurred? and 2. Whether a sale and conveyance of part of a tract of land by the treasurer, for the payment of taxes, without defining any particular part, vested any title in the purchaser? His honour, Justice *Rogers*, directed the jury to find for the plaintiff, and reserved these questions for discussion and decision by the court in bank.

Conyngham and *Williston*, for appellants, on the first point cited: *Powel on Powers* 372; *Sugden on Powers* 209, 265; 7 *Com. Dig.* 8; 4 *Johns. Cha. Rep.* 368; 9 *Serg. & Rawle* 181; 4 *Binn.* 31; *Willis on Trustees* 140; and on the second point, 1st section of the act of 1815, *Purd. Dig.* 865; 2d section of the act of 1804, 13 *Serg. & Rawle* 151.

Grier and *Case*, for appellees: *Willis on Trustees* 72, 84, 127, 133; 2 *Fonb.* 167; 2 *Johns. Rep.* 220; *Coxe's Dig.* 272; on the second point, 13 *Johns. Rep.* 97, 552; 11 *Johns. Rep.* 373; 2 *Johns. Cas.* 384; 2 *Johns. Rep.* 248; 1 *Cruise* 350.

The opinion of the Court was delivered by

Gibson, C. J.—The report of the judge presents two points. 1. The sufficiency of the plaintiff's title under the several conveyances of the trustees. 2. The supposed divesture of his title by the treasurer's sales. The latter of these was reserved at the circuit in order to bring it without prejudice before the court in bank.

It is to be observed that this ejectment is not employed in the present instance, as it sometimes is in others, to perform the office of a bill in equity, and that involving no considerations arising out of the trust, it is strictly an action at law. Such an action may be maintained here, as it may elsewhere, on a naked legal title; and the first inquiry therefore is, whether a conveyance of the legal estate,

not ostensibly in execution of the trust, is void at law? No reason or authority has been shown to justify us in declaring it so. So far is the common law from lending any peculiar aid to the execution of a trust of land, or restraining the trustee from abusing it, that it does not acknowledge its existence. Even trustees to support contingent remainders may disappoint the object by a common recovery; and this without other redress than punishment by the chancellor for the abuse of their office. In the familiar instance of a conveyance by a trustee with notice, it never has been doubted that the legal estate actually passes, though the motive were to disincumber it of the trust; and notwithstanding equity puts the fraudulent purchaser in the place of the trustee, it does so but at the instance of the interest attempted to be defrauded, and not of an intruder—the *law* interferes at the instance of no man. It has been suggested, that however the matter may stand where there is a separate administration of law and equity, yet where the legal and the equitable estates are convertible, the law, which looks to the substance as well as the form, should do the office of equity by declaring conveyances in derogation of the trust to be void in the first instance. I need but refer to the case of *Lodge* v. *Simonton*, 2 *Penns. Rep.* 439, in order to show, that to confound the legal with the equitable title, would confound our most settled distinctions, and throw our jurisprudence into irreparable disorder. Our books are full of instances, in which the title depended on the distinction; and it is not too much to say, that an attempt to abolish it would shake our system of landed property to its foundation. The substance of the relief to be had against a purchaser with notice, is the same here that it is in England; the difference being in the manner and means by which it is obtained. There he is dealt with as a trustee in the place of him from whom he had the title, and compelled to perform the trust, by the instrumentality of a bill in equity; here the same effect, in substance, is produced by compelling him to surrender the possession to the beneficial owner, or perhaps by the appointment of a trustee in his stead. But this can be done at the instance of the *cestui que trust*, and not of one who holds in hostility to his title. If an authority for these rudimental principles were wanting, it might be had in *Bayard* v. *Colfax*, *Coxe's Dig.* 272, in which it was ruled by the circuit court of the United States for the district of New Jersey, that a third person cannot object to the title of a plaintiff founded on a conveyance of the legal estate by a trustee, on the ground of its having been an abuse of the trust; and that even the *cestui que trust* can be relieved but in equity. Nothing, it seems to me, is more reasonable than this; for it would be absurd to listen to the complaint of an intruder, in behalf of one who does not think fit to complain for himself, and one whose interest it is not to complain; for the recourse of the *cestui que trust* would undoubtedly be less difficult against the holder of the legal title, than against one who holds adversely not only to the equitable title, but the legal

title also. But the very point was decided by this court, in *Hunt* v. *Crawford*, 3 *Penns. Rep.* 426. The plaintiff therefore must recover, unless his title has been divested by the treasurer's sales.

The objection to the treasurer's deeds is, that they define the quantity, but not the part sold. Such an uncertainty in the grant of an individual, is remediable at the common law, by the election of the grantee; but not in the case of the king, against whom there is no election; and his grant is therefore said to be void for the uncertainty! Our county treasurers, though agents of the public, are not invested with this prerogative, which, relating as it does to the person of the king, and not to his government, is inapplicable to the sovereignty of a republic; and at all events, the right of election, if permissible on other grounds, in a case like this, is to be exercised adversely to the right of the debtor and not of the public. A distinction, however, is attempted on another ground, and not without a respectable show of authority. In delivering the opinion of the court in *Jackson* v. *Delancy*, 11 *Johns.* 373, Mr Justice *Yeates* remarked, that though a general description in a mortgage, is open to no objection, because a party conusant of his rights may sell as he pleases; yet that an officer must define what he sells. The point before us was touched but incidentally, and in a way too which is not in unison with our own decisions. In *Heyskill* v. *Given*, 6 *Serg. & Rawle* 369, the levy of "a tract of land in the name of *Mordecai M'Kinney*, containing three hundred acres more or less," was held certain enough, as the subject was susceptible of ascertainment, by recourse to extrinsic circumstances; and in *Swartz* v. *Moore*, 5 *Serg. & Rawle* 257, it was determined that if a levy and sale are not by fixed boundaries, or of an ascertained quantity, but of a certain number of acres, more or less, in the tenure of A B, the vendee holds to the extent of such preceding tenure. I am aware that this is foreign to the question of election; but the decisions in New York are as far from touching it as are our own. In the same case of *Delancy* v. *Jackson*, as it appeared on a writ of error in 13 *Johns.* 551, the chancellor certainly did not put his objection to the deed on the impossibility of ascertaining the subject of it, but on the supposed detriment to the debtor, from a description so loose as to leave the value of the property altogether uncertain, in the estimate of the bidders; and in *Jackson* v. *Rosevelt*, 13 *Johns.* 97, Mr Justice *Yeates* put the opinion of the court on the same foundation. These cases were determined on principles of policy and convenience; and how far that might distinguish them from a decision on the construction to be made of a statutory power, would be a matter of inquiry were they of binding authority on this court. Except *Erwin* v. *Helen*, 13 *Serg. & Rawle* 155, to be noticed presently, the only case that seems to come entirely up to the point, is *Haven* v. *Cram*, 1 *Adams's N. H. Rep.* 93, where a constable's deed, in which land sold for taxes was described as "a certain tract of land, part of No. 300, containing two hundred and fifty acres," was held void for uncertainty. We know not what are

the statutory provisions of New Hampshire, but it seems to me an unanswerable argument in favour of reduction to certainty by election, arises from the provisions of our own. By the act of 1804, the treasurer is directed "to make public sale of the whole *or any part* of such tracts of unseated land as he may find necessary for the payment of the taxes due thereon respectively." Granting, then, that, by the principles of the common law, none but the absolute owner of the land may sell on terms that give the purchaser an election, and that an officer is bound to sell a parcel in the way most advantageous to him, by preventing the purchaser from taking his quantity so as to spoil the residue; yet if the object of a statute which directs the sale can be accomplished but by relaxing the common law in this particular, an authority to do so is as much a part of the statute as if it were given in terms. Were it otherwise the statute would be controlled by the common law. What, then, was the object here, and what the means of its accomplishment? The authority to sell a part was evidently designed to protect the owner from an unnecessary sacrifice of his property; and in the construction of it, respect is to be had to the state and condition of the subject of it, at the time of the enactment; for these must be taken to have been within the contemplation of the legislature. If the provision for the benefit of the owner, can not be executed consistently with the technical principles of a grant, without frustrating the object of it, by reason of the actual circumstances; those principles must give way, for the reason that the common law must give way when a statute can not be executed without it. In 1804, then, when the statute was enacted, these unseated lands were literally in the wilderness. Nine years afterwards, when I became acquainted with the northern part of the state, where the principal part of them are situated, entire districts were yet unsettled; and instead of defining a part of any particular tract with certainty, it would not have been an easy matter to determine the township in which it lay. It was found to be impracticable to assess them separately, according to the actual value of the tract; in consequence of which, the practice was to rate them all alike, and usually at twenty-five cents the acre, which was about the eighth part of the average value. To have designated the particular parcels intended to be sold, would have required not only a general survey of the country, but a particular survey of each tract; which would have doubled the charges and rendered the proceeds, even of the whole, inadequate to payment of the tax; certainly an unprofitable measure for both parties. But having set apart a particular parcel by survey, there would have been no certainty of its sufficiency to raise the sum required, and the expense of the previous survey would have been a dead loss, the whole being brought to the hammer whenever the bidders understood their interest. In these circumstances, then, there could have been no designation before the sale; and to have made it by the terms of the contract in a way to effect the purpose of the legisla-

ture, was still more difficult. In fact there was but one way in which it could be done at all. A parcel containing a definite number of acres might be cut from a particular side of the survey, by a line to be run conformably to a designated course; but is it to be supposed that the legislature had in view a method which would be obnoxious to the very objections intended to be avoided: for it is evident the bidders would have been left by it as much in the dark as ever, in regard to the actual value; and as to advantage to the owner, no one can doubt that the tract would be as effectually ruined for every purpose of usefulness to either party, as if the purchaser were allowed to take his part at his election. It is not to be supposed that the bidders would enter into a blind bargain for a part, when they might, by holding off, obtain the whole unmutilated by an arbitrary division, without regard to its natural advantages, or the relative situation of springs, watercourses, upland, and meadow. A power to sell a part, necessarily includes a power to sell in the way most conducive to the object; and if the statute is to have a reasonable construction, it must be taken that a plan of such extreme but fruitless nicety, was not within the contemplation of the legislature. To say that the part sold shall be designated at the sale, by a mathematical line, is to say that the power shall be executed for the potential and not the actual benefit of the owner. In *Erwin* v. *Helen*, already mentioned, a more restricted authority was thought to be vested in the treasurer, who was supposed incompetent to sell on terms which imply an election by the grantee. It is obvious that the question did not directly or even necessarily arise: as the assignment of error had regard to want of descriptiveness in the declaration; and it was not pretended that the purchaser had, in fact, made an election, without which his title would have been imperfect under any determination of the principle. The *obiter* opinion of a judge, though entitled to great respect, can not claim the submission due to an authority; and I am not disposed to yield more deference to my own *dicta* than to those of any other judge. That a position taken but as one of the grounds of a legal inference, is less likely to be secure than the inference is to be correct, will be admitted by all who are familiar with the investigation of principles depending on authority. The powers of the judge are mainly bent on accuracy in the result; and it is more probable that it will be attained there, where the point has been the subject of direct discussion and deliberate consideration, than where it was incidentally involved, and the conclusion promptly drawn, after an argument, in which the subject was but barely touched. It was supposed that the designation of a particular locality would render the grant certain to a common intent, and be an execution of the statutory provision, according to its intent, without the violation of a pre-established rule. Further reflection has led to an opinion, that though the greater part of the land may thus be designated with tolerable certainty, yet that as particular parts may be included or left out when the boundaries come to be fixed, the grant must be

uncertain as to these; and it is impossible to conceive of its going into immediate operation as to a part and not the whole. The difficulty would still remain to be surmounted by an election, as the grantee would be entitled to have the land laid off, in the way most beneficial to him in respect to every thing else than its situation in relation to the rest of the tract as a whole; and little would be gained by discriminating betwixt an election as to locality, and an election as to boundaries. The defect in the view of the subject taken in that case, was in considering it practicable to execute the statute consistently with the common law principles of a grant, by what was still an imperfect designation, the difference being but in the degree. As I am of opinion that such an execution would not satisfy the design of the law, I am for allowing the grantee an unrestricted choice, as a necessary incident of the sale and the consequence of a reasonable interpretation of the statute.

But, the vesting of the residue in the purchaser by a subsequent sale, as was done in respect to one of these tracts, would cure the original defect in the conveyance, if any there were, by superseding the necessity of an election or particular designation altogether. This consequence of adding the residue to the part sold, could be evaded but by holding the first deed to be void at the time of its delivery; which would perhaps render the second equally so. Was it however so void as to be incapable of confirmation by any act whatever? A principle which would produce that effect must equally defeat the grant of an individual, as the reduction to certainty by an election subsequently would come too late; such however is not the law, for in the case of an individual, the act of election may be delayed for any period within the lifetime of the grantee, unless perhaps where it is hastened by a request. "Where nothing passeth," says Lord Coke, "to the feoffee or grantee before election of the one *thing* or the other, there the election ought to be made in the lifetime of the parties, and the heir or executor can not make it. But where an estate or interest passes *immediately* to the feoffee or donee, the election may be made by themselves, their heirs or executors. Secondly, where one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what *manner or degree* he will take this, there the interest passeth immediately, and the party, his heirs and executors, may make election when they will." *Co. Litt.* 145 *a.* In other words, where the election is not between things but modes of enjoyment, the interest passes presently, and the mode may be determined by the representatives of the donee; but where it is between things, as it was in the case before us, the interest does not pass presently; and as it can not vest in the donee after his death, an election to give it effect must be made in his lifetime. But may it not vest by any other act which equally fixes the operation of the grant? In *Heyward's Case*, 2 *Rep.* 36, it is said: "if a man makes a lease for life of two acres, the remainder of one to *J. S.* and of the other to *J. N.*; he who first makes election shall

enjoy the one acre, and *thereby* the other acre hath vested in the other." And, evidently, because the act of another has superseded the necessity of an election by him, by removing the original uncertainty without his intervention. The difference betwixt that case and the present consists but in this, that the uncertainty was removable in the former by the grantees or one of them, and in the latter by the grantor; but it is not easy to understand why it should make the grant void *ab initio*, unless it were incapable of being removed in any way. Assuredly it might be removed by a grant of the residue, in the case of the king, against whom there is no election, just as it might be removed, in the case of a subject, by an election actually made; and why it may not by the treasurer's grant of the residue, when he has the same power of disposal in a case fairly arising under the statute, I am at a loss to comprehend. An act which removes the original obstacle to an immediate operation of the grant, ought to be equally effectual as an election, come from what quarter it may. Even taking it for granted, then, that the purchaser had no election under the first grant, yet the object of an election being attained in another way, both grants became operative in him; and, this, were it necessary to recur to it, would dispose of his title to the tract in the name of *Israel Pleasants*. But the election actually made by the defendants is effectual to dispose of it as to both; and as it appeared on the evidence, the verdict ought to have been in their favour.

Judgment reversed and a new trial awarded.

INDEX.

tion and repose, and protects not only *bona fide purchasers*, but *heirs* and *devisees* and those claiming under them. *Kerper* v. *Hoch*, 9.

Where nearly *nine* years after the death of intestate, suit was brought and judgment had against his estate, it was held that the person so obtaining judgment could not come in upon any portion of the parcels of land taken by the intestate's son under a writ of partition and valuation of the real estate of his father, and sold by virtue of judgments against the son, neither as against the creditor of the son, nor the son himself. *Ibid.*

2. Whenever the legal title to land is in one person, and the real interest in another, they form but one title, and the statute of limitation does not run between the holders of such title, until the trustee disclaims and acts adversely to the *cestui que trust;* and such disclaimer must be made known. *Rush* v. *Barr*, 110.

Fraud prevents the operation of the statute of limitation, and it does not commence to run until the discovery of the fraud. *Ibid.*

3. There must be an acknowledgement of an *existing* debt within six years, to prevent the operation of the statute of limitations. *Lyon* v. *Marclay*, 271.

Cases of trust, not to be reached or affected in equity by the statute of limitations, are those technical and continuing trusts, which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of courts of equity: it must be a direct trust, belonging exclusively to the jurisdiction of a court of equity, and the question must arise between the trustee and *cestui que trust*. *Ibid.*

4. Nothing short of an actual, continued, visible, notorious, distinct and hostile possession of land for twenty-one years, will enable a defendant to avail himself of the statute of limitations. And if his possession be obtained by virtue of a writ of *habere facias possessionem*, the twenty-one years will commence to run from the execution of that writ, and not from the date of the demise laid in the declaration in the action wherein that issued. *Mercer* v. *Watson*, 330.

5. Against a right of action, dependent on the existence of a secret fraud, the statute of limitations runs but from the period of discovery. *Pennock* v. *Freeman*, 401.

6. The facts of one in possession of land having been driven from it by a flood or other accident, and when out kept out of possession by the force of an adverse claimant; although he may continue to endeavour to obtain the possession, yet the statute of limitations will be a bar to his recovery, after such adverse claimant has been in possession twenty-one years. *Malson* v. *Fry*, 433.

7. The presumption of law that a debt has been paid, or a right of way has been granted, or a bond or mortgage or legacy has been satisfied, are those deductions from the existence of a fact, to which a legal effect is attached beyond their nature and operation. They are either conclusive, and may be made by the court, or inconclusive and can only be found by a jury. It is not so much a presumption that the money has been paid, or a right of way granted, as it is the substitution of an artificial rule in the place of evidence or belief, after a delay which may have been destructive of the evidence on which a belief might be justly founded. *Summerville* v. *Holliday*, 507.

Where a presumption of payment from the lapse of time is not repelled by circumstances accounting for the delay, it is the duty of the court to instruct the jury that they are bound by the legal presumption; but where there is some circumstance given in evidence to account for the delay, it is the duty of the court to refer to the jury, as an open question of fact, to determine as to actual payment. *Ibid.*

END OF VOL. I.

LAW WORKS

FOR SALE BY

JAMES KAY, JUN. & BROTHER, PHILADELPHIA,

JOHN I. KAY & CO. PITTSBURGH.

LIVINGSTON'S CRIMINAL CODE.

IN ONE VOLUME ROYAL OCTAVO.

SYSTEM OF PENAL LAW,

CONSISTING OF

A CODE OF CRIMES AND PUNISHMENTS, A CODE OF PROCEDURE, A CODE OF EVIDENCE, A CODE OF REFORM AND PRISON DISCIPLINE, AND A BOOK OF DEFINITIONS.

Prepared under the Authority of the State of Louisiana.

BY EDWARD LIVINGSTON, LL.D.

LATE SECRETARY OF STATE.

TO WHICH ARE PREFIXED,

A PRELIMINARY REPORT ON THE PLAN OF A PENAL CODE, AND INTRODUCTORY REPORTS TO THE SEVERAL CODES IN THE SYSTEM OF PENAL LAW.

Opinions of the Press.

The reputation of this work is established, and the topics which it embraces are highly important for every jurist and every citizen who may become a legislator. *Mr Walsh, National Gazette.*

It is unnecessary for us to enter into a detailed critique of the work. It is known, at least by reputation, to every lawyer and every statesman in the land. It has been pronounced, both at home and abroad, a masterpiece of its kind, and has perhaps reflected as much honour upon this country as any other American production. *Pennsylvania Inquirer and Courier.*

The name of Livingston will go down to posterity in honourable companionship with the long list of illustrious sages whose exertions at the bar and on the bench, and whose investigations in the closet, have adorned one of the noblest of the professions. No respectable lawyer's library will be without this book, nor will it be deemed less essential to the statesman, the philosopher, and the man of general science. *New York Courier and Inquirer.*

No lawyer, legislator, or general reader who can "live at home in ease," should be without this useful appendage to his library. Its merits have already received the sanction of the ablest jurists in Europe. *American Sentinel.*

The subjoined Works are all of the Latest and Best Editions:

Starkie on Criminal Pleading.

Archbold's Forms and Entries in Personal Actions and Ejectments.

Manual of Forms in the Courts of Pennsylvania.

Powell on the Law of Contracts and Agreements.

Blackstone's Commentaries on the Law of England. With Christian's, Chitty's, Lee's, Hovenden's, Ryland's and American notes, the whole in 2 large volumes.

Maddock's Principles and Practice of the High Court of Chancery, 4th American edition, with References to American Decisions, 2 vols.

Starkie on the Law of Slander, with References to American Decisions by Huntington.

The Federalist, by Hamilton, Madison and Jay, corrected by Mr Madison, best edition.

Rutherford's Institutes of Natural Law.

Burlamaqui's Principles of Natural and Politic Law, 2 vols in 1, 7th edition.

Collyer on the Law of Partnership, with Notes of American Cases by Phillips and Pickering.

Comyn on Contracts, with American Notes by Huntington.

Durnford and East's Reports in the Court of King's Bench, with numerous References to American Authorities, 8 vols in 4.

Adams on Ejectment, by Tillinghast.

Starkie on Evidence, in 2 large volumes, just published.

Cruise's Digest of the Laws of England respecting Real Property, 6 vols in 3, with American notes, *just published.*

Lambert on Dower.

Hovenden on Fraud, with American Notes by Huntington, 2 vols in 1, *just published.*

Digest of the Law of Executor and Administrator, Guardian and Ward, and Dower, by Comstock, Judge of Probate in Connecticut.

Chitty's Criminal Law, with American Notes, 3 vols.

Ballantine on Limitations, with considerable American additions by Tillinghast.

REPORTS.

WATTS'S REPORTS OF THE SUPREME Court of Pennsylvania, from May 1832 to June 1833, vol. 1. Being in immediate continuation of the 3 volumes of Reports by Messrs Penrose and Watts.

PETERS'S CONDENSED REPORTS of the Supreme Court of the United States, containing the whole series of the Decisions of the Court from its organization to the commencement of Peters's Reports at January Term 1828, with Copious Notes of Parallel Cases in the Supreme and Circuit Courts of the United States up to the present time, 6 vols royal 8vo.

This work entirely supersedes and embraces, for less than one-fourth the cost, the four volumes of Dallas, the nine volumes of Cranch and the twelve volumes of Wheaton; and in the "copious Notes of Parallel Cases in the Supreme and Circuit Courts of the United States" which it contains, is decidedly preferable to them. The following short notices by eminent individuals are subjoined.

Chief Justice Marshall. "I think the work calculated to be eminently useful to the profession."

Mr Justice Story. "It well deserves the title given to it....The Editor is entitled to the thanks of the Bar....and it is to be hoped that the decisions of the Supreme Court will be more generally known than they have been heretofore."

Mr Justice Thompson. "I have examined it with great care, and I do not hesitate to express my entire satisfaction with the plan and execution of it."

Mr Berrien, late Attorney-General of the United States. "I am very much rejoiced that the decisions of that very distinguished tribunal are thus placed within the reach of the profession generally."

PETERS'S REPORTS OF CASES ARGUED and Adjudged in the Supreme Court of the United States, from January Term 1828 to January Term 1834 inclusive, 8 vols.

These Reports are in immediate continuation of "Peters's Condensed Reports" in the same court; and together with them contain, in fourteen handsome volumes, the decisions of the court from its organization to the present time.

Wendell's Reports of Cases in the Supreme Court of New York, 10 vols, calf.

Edwards's Reports of the Vice-Chancellor's Court of New York, vol. 1. (The only volume as yet published.)

Troubat and Haly's Digest of Pennsylvania Laws—in continuation of Purdon.

This volume should be purchased by those who possess old editions of Purdon's Digest, and who are unwilling to incur the expense of purchasing the new one.

Day's Reports of the Supreme Court of Connecticut, 9 vols.

ENGLISH CHANCERY REPORTS Condensed, commencing at the year 1821, and containing the Decisions of English Chancellors, Masters of the Rolls and Vice-Chancellors to the present time. The sixth volume contains some of the adjudications of Lord Chancellor Brougham. In 6 volumes royal 8vo, beautifully bound. This publication will be continued by an annual volume.

Durnford and East's Reports in the Court of King's Bench, with numerous References to American Authorities, 8 vols in 4. *Just published.*

Saunders's Reports in the Court of King's Bench, with Notes by Williams, Patteson and Williams, 3 vols.

ENGLISH COMMON LAW REPORTS, 11 vols, containing the following valuable Reports, bound uniformly, viz.

Burrow's Reports, forming vols 1, 2.
Cowper's Reports, vol. 3.
Durnford and East's Reports, vols 4, 5, 6, 7, 8, 9, 10, 11.

SUGDEN ON VENDORS.

New Edition.

The Subscriber is about to publish an edition of "A Practical Treatise of the Law of Vendors and Purchasers of Estates," by Sir E. B. Sugden, with references to the Statutes of Pennsylvania, and the principal American decisions. The work will be printed from the 9th London Edition, published in May 1834; and applications for copies may be made to JAMES KAY, JUN. & BROTHER, 122 Chestnut Street, Philadelphia, who will print the work.

EDWARD D. INGRAHAM.

Philadelphia, November 20, 1834.